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The opening up, by the United States government, of portions of the Indian Territory, for settlement, has created a new subdivision of American law, which is now known as "sooner" law. The official publication of the statutes of Oklahoma is authority for the legal use of the term. The notoriety given to the settlement of the Oklahoma country has doubtless familiarized all our readers with the expression, and they do not need to be told that a "sooner" is simply one "who starts in the race for virgin soil before the word 'go' is officially given," to adopt an appropriate definition framed by an exchange. But it will perhaps be news to some that there is now a distinct branch of the law, known as "sooner law." And in view of the intense struggle and expedients resorted to by settlers to gain the coveted land, we expect the body of that peculiar branch of the law will, in a short space of time, assume vigorous proportions.

One provision of the law opening up the territory to settlement is, that no person who is within the territory to be opened for settlement before the executive proclamation takes effect, shall be eligible to acquire a claim. The recent case of Smith v. Townsend, decided by the Supreme Court of Oklahoma, is of interest on that point. This litigation grew out of the opening of the original portion of Oklahoma. The proclamation of the President of the United States as to this region declared that it might be entered on April 22, 1889, at 12 M. The plaintiff, an employee of a railroad running through the territory, by virtue of his position entered the territory on March 2, 1889, and remained there until April 22. When the hour of noon of the latter day arrived he selected a desirable quarter section and settled on the same as his homestead, making homestead entry of said land at the United States land office at Guthrie, April 23, 1889. The local land officers decided in favor of his right to the homestead, but such decision was afterwards reversed by the commissioner of the general land office, whose decision adverse to the "sooner" was affirmed by the secretary of the interior. The action of the court was, in effect, a re-trial of the controversy, the plaintiff asking to have declared a trustee for his benefit a person who had made a *bona fide* entry on the land and acquired the legal title. The court followed the decision of the interior department, holding that the fact that a previous entry for business purposes was lawful could not have the effect of relieving a would be settler from the disqualification of "sooning."

The death of Lord Bramwell, of the English House of Lords, after a judicial career of the unprecedented length of thirty-six years, seems to be universally regretted, both by the English profession and the public. The only parallel in recent times to his prolonged judicial service was that of Baron Parke, between whose appointment to the King's Bench and his death, a period of forty years elapsed. The popularity attained by Lord Bramwell, among the profession, is the more noteworthy in view of his extreme independence and originality, which caused him to differ frequently with his brethren. His contempt of popular sentiment was in marked contrast to that of many judges. It is related of him that on one occasion some observation, in a charge to a jury, was received with applause. The judge paused a moment, and then said quietly: "I recall those words—I must have been saying something foolish." He was said to be both the best criminal lawyer and the best commercial lawyer of his day—an unexampled combination of excellence—while his judgments on all points which came before him were distinguished by a rare good sense. The application and extension of the doctrine *sic utere tuo ut alienum non lædas* in the well known case of Rylands v. Fletcher, in the House of Lords, were due, in the first instance, to Baron Bramwell, who differed from the other members of the Court of Exchequer. In that case the liability of an owner of land was maintained for damage done to neighboring land by the introduction of a dangerous element which injures the adjoining land, and the liability exists even in the absence of wilfulness or negligence.

He was also often very clear in brushing away dangerous refinements, as in the case of the distinction sought to be established between legal fraud and moral fraud, on which he made some valuable observations in the famous directors' case of Peek v. Derry, a report of which may be found in 29 Cent. L. J. 122, 132.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW — PROTECTION BY FEDERAL AUTHORITY FROM MOB VIOLENCE.— The important question, discussed at length by Mr. Justice Gray, in Logan v. United States, recently decided by the Supreme Court of the United States, is whether the right of a citizen of the United States in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, to be protected against lawless violence, is a right secured to him by the constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several States. It was held that such right is "secured to him by the constitution or laws of the United States," within the meaning of Rev. Stat. § 5508, making it a crime to "conspire to injure," etc., any citizen in the free exercise or enjoyment of such right. The court, after quoting the words of Chief Justice Marshall in McCulloch v. Maryland: "The government of the Union, though limited in its powers, is supreme within its sphere of action," continue:

Among the powers which the constitution expressly confers upon congress is the power to make all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. In the exercise of this general power of legislation congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the constitution. McCulloch v. Maryland, 4 Wheat. 316, 421; Juilliard v. Greenman, 110 U. S. 421, 440, 441, 4 Sup. Ct. Rep. 122.

Although the constitution contains no grant, general or specific, to congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offenses against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of congress to provide for the punishment of all crimes and offenses against the United States, whether committed within one of the States of the Union or within territory over which congress has plenary and exclusive jurisdiction.

To accomplish this end, congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offense, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any State. Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. Rep. 544. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the constitution and laws of the United States.

The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in peace of the United States. There was a co-extensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection, and peace; and a corresponding right of those persons, secured by the constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

The cases heretofore decided by this court and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views, but on the contrary, contain much to support them. The matter considered in each of those cases was whether the particular right there in question was secured by the constitution of the United States, and was within the acts of congress. But the question before us is so important, and the learned counsel for the plaintiffs in error have so strongly relied on those cases, that it is fit to review them in detail.

The court here enters into an exhaustive review of the following cases: U. S. v. Reese, 92 U. S. 214; U. S. v. Cruikshank, 92 U. S. 543; Shander v. West Va., 100 U. S. 303; *Ex parte* Virginia, 100 U. S. 339; U. S. v. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3; *Ex parte* Yarbrough, 110 U. S. 651; U. S. v. Waddell, 112 U. S. 76; Baldwin v. Franks, 120 U. S. 678; *In re* Neagle, 135 U. S. 1.

FRAUDS, STATUTE OF — ORDER FOR GOODS TO BE MANUFACTURED.—In Pratt v. Miller, decided by the Supreme Court of Missouri, which was an action for the price of goods sold, it appeared that defendant ordered from plaintiff's salesman a bill of boots and shoes, to be manufactured by plaintiffs; that the salesman made a copy of the order,

signed it himself, and gave it to defendants. Before the order was shipped, it was countermanded by defendants. It was held that the contract was for the sale of "goods, wares and merchandise," within the meaning of Rev. Stat. 1879, § 2514, which provides, *inter alia*, that "no contract for the sale of goods," etc., "for the price of $30 or upwards, shall be good, unless some note or memorandum thereof be made in writing, and signed by the party to be charged," and plaintiffs could not recover. Brace, J., says:

Section 2514, Rev. St. 1879, provides that "no contract for the sale of goods, wares and merchandise for the price of thirty dollars and upwards shall be allowed to be good unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized." This statute was first enacted in this State in 1825 (Laws Mo. 1825, p. 214), and, except as to the amount, is almost a literal transcript of the English statute (29 Car. II, ch. 3, § 17). The question to be determined in this case is whether the contract in question is a contract for the sale of goods, wares and merchandise, or a contract for work and labor to be done and material to be furnished. If the former, it is within the statute, and the plaintiffs cannot recover. If the latter, it is not within the statute, and they may. The Kansas City Court of Appeals, in effect, held that the contract belonged to the latter class, and was not within the statute, without discussing the question, but simply citing Brown on the Statute of Frauds (section 368*a*) in support of its conclusion. The whole question as to when a contract is to be held to belong to one or the other of these classes was maturely considered and ably discussed in Burrell v. Highleyman, *supra*, by the St. Louis Court of Appeals; the majority of the court, in an opinion delivered by Rombauer, P. J., holding, in consonance with the ruling in Lee v. Griffin, 1 Best & S. 272, that "when the subject-matter of a contract is a chattel to be afterwards delivered, then, although work and labor are to be done on such chattel before delivery, the cause of action is goods sold and delivered, and the contract is within the statute of frauds." Thompson, J., in a dissenting opinion, after reviewing the English cases from the passage of the act in England until the date of its adoption in this State, adhered to the construction placed upon the statute by the English courts prior to the latter date, and by the Supreme Court of New York in Crookshanks v. Burrell, 18 Johns. 58 (decided in 1820), *i. e.*, "that a contract to deliver at a future day a thing not then existence, and yet to be made, is not within the statute;" or, as stated in the syllabus, "where work, labor or materials are to be applied to the chattel in order to put it in condition for delivery to the purchaser, the contract is not within the statute." Mr. Benjamin, in his excellent treatise on Sales, in entering on a review of the English cases, says: "There have been numerous decisions and much diversity and conflict of opinion in relation to the proper principle by which to test whether certain contracts are contracts for the sale,' etc., under the seventeenth section, or contracts for work and labor done and materials furnished" (1 Benj. Sales, § 108), and concludes by saying (section 117): "In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in Lee v. Griffin, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough in 1814, and closing with Pollock, C. B., in 1856. From the very definition of a sale, the rule would seem to be deducible that if the contract is intended to result in transferring for a price, from B to A, a chattel in which A had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of Bayley, J., in Atkinson v. Bell, 8 Barn. & C. 277, and Tindall, C. J., in Grafton v. Armitage, 2 C. B. 336; but it was not clearly brought into view before the decision in Lee v. Griffin. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result." The result of that process in America, briefly stated in a general way, may be found in 8 Amer. & Eng. Enc. Law, p. 707 *et seq.*

In New York the rule is that, if the subject-matter of the transfer does not exist *in solido* at the time of making, the contract is for work and labor, but if it does then exist the contract is none the less a contract of sale; that work and labor of the vendor is to be expended upon it before its delivery. This rule is founded upon the decision in Burrell v. Johnson, *supra*, afterwards followed in Parsons v. Loucks, 48 N. Y. 17; Cooke v. Millard, 65 N. Y. 352, and other cases based on old English decisions, such as Towers v. Osborne, 1 Strange, 506, and Clayton v. Andrews, 4 Burrow, 2101. In Cooke v. Millard, *supra* (decided in 1875), Dwight, J., remarks: "Were this subject now open to full discussion on principle, no more convenient and easily-understood rule could be adopted than that enunciated in Lee v. Griffin. It is at once so philosophical and so readily comprehensible that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this State. So far as authoritative decisions have gone they must be respected, even at the expense of sound principles."

In Maryland, in Eichelberger v. McCauley, 5 Har & J. 213, (decided in 1821), the rule of the earlier English decisions was maintained; Earle, J., in delivering the opinion of the court, saying: "Whatever opinion may be entertained of the true meaning of the seventeenth section of the statute, the court thinks the distinction between mere contracts of sale of goods and those contracts for the sale of goods where work and labor is to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in contemplation of the statute, has too long prevailed to be at this day questioned." Citing the English cases of Clayton v. Andrews (decided in 1767), and Rondeau v. Wyatt, (in 1792), in support of the conclusion. In the later case of Rentch v. Long, 27 Md. 188, the ruling in Eichelberger v. McCauley was affirmed; Bartol, J., speaking for the court, saying: "Whatever opinion we might entertain on this question if it were presented for our consideration for the first time, we are not willing to disturb the rule established by that case." It will be observed that the

rule of construction established in these States is not maintained in the latter case upon the ground of sound principle, nor yet upon the ground that the courts were concluded by the early English rulings made before the statute was enacted in those States, but upon the ground that, these rulings have received a particular construction by their own courts in their early rulings, they felt constrained to maintain them, to the extent stated, on the principle of *stare decisis*.

In most of the other States where the courts were not much fettered, while the rulings cannot be said to go the length of that in Lee v. Griffin, which is now the settled rule in England, they trend in that direction. As illustrative of this fact the following cases may be cited: Mixer v. Howarth, 21 Pick. 205; Spencer v. Cone, 1 Metc. (Mass.) 283; Gardner v. Joy, 9 Metc. (Mass.) 177; Lamb v. Crafts, 12 Metc. (Mass.) 353; Goddard v. Binney, 115 Mass. 450; Pitkin v. Noves, 48 N. H. 294; Prescott v. Locke, 51 N. H. 94; Atwater v. Hough, 29 Conn. 508; Finney v. Abgar, 31 N. J. Law, 266; Cason v. Cheely, 6 Ga. 554; Edwards v. Railway Co., 48 Me. 379; Sawyer v. Ware, 36 Ala. 675; Meincke v. Falk, 55 Wis. 427, 13 N. W. Rep. 545; Brown v. Sanborn, 21 Minn. 402. In many of these cases, rules are laid down for distinguishing a contract of sale from one for work and labor and materials, not always harmonious or entirely consistent with each other, but from which a general rule may be drawn, broadly stated as well in Brown on Frauds as elsewhere: "That if the contract is essentially a contract for the article manufactured or to be manufactured the statute applies to it. If it is for the work, labor, and skill to be bestowed in producing the article, the statute does not apply; * * * the true question being whether the essential consideration of the purchase is the work and labor of the seller, to be applied upon his material, or the product itself, as an article of trade." Sections 308, 308*a*. And, within the general scope of the American authorities, this rule may be formulated, determinative of the case in hand: That where the contract is for articles coming under the general denomination of goods, wares, merchandise, the vendor being at the same time a manufacturer and a dealer in them, as a merchant, or, so dealing, has them manufactured for his trade by others, and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware, the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered. This rule, predicated upon the undisputed facts of this case, is within the ruling in Burrell v. Highleyman, by the St. Louis Court of Appeals, and in conflict with the conclusion reached by the Kansas City Court of Appeals. And, while sufficient for the disposition of this case, it is proper to add generally, this being the first time this court has been called upon to pass upon this question directly, that while we adhere to the rulings heretofore made in Skouton v. Woods, 57 Mo. 380; Skrainka v. Allen, 76 Mo. 384; and Snyder v. Railroad, 86 Mo. 613,—in adopting the statute of another State or of a foreign country, it is to be presumed that the legislature adopted such statute as construed by the courts of the State or country from which such statute is taken. Yet it is to be remembered that the force of this presumption must depend upon the extent to which the terms of the statute have acquired a known and settled meaning and a definite application at the time of its adoption in the courts of the jurisdiction from which the statute is taken; and, while such construction has more weight than a construction of the same statute by the courts of the same country subsequent to its adoption in this State, yet it can never amount to more than persuasive authority as to the true intent and meaning of the statute and the proper application of its terms, or be permitted to prevail against a plain and obvious interpretation of the statute, or countervail the general policy of our laws and practice. Endl. Interp. St. § 371.

CONTRACT—REPAIRING MILL — BREACH — MEASURE OF DAMAGES.—In John Hutchinson Mfg. Co. v. Pinch, 51 N. W. Rep. 930, the Supreme Court of Michigan decide that in a suit to recover for machinery and repairs furnished for defendant's flouring mill, he was entitled to show in reduction of plaintiff's claim the value of the use of the mill while it was compelled to lie idle by the failure of plaintiff to complete the contract to repair within the time specified. Morse, C. J., says, *inter alia:*

This was a custom, as well as a manufacturing, flouring-mill. The prospective profits of such a mill would certainly be too speculative to be shown as damages. Howard v. Manuf'g Co., 139 U. S. 199, 11 Sup. Ct. Rep. 500; Pennybacker v. Jones, 106 Pa. St. 237; Abbott v. Gatch, 13 Md. 314; Rogers v. Bemus, 69 Pa. St. 432; Winne v. Kelly, 34 Iowa, 339; Allis v. McLean, 48 Mich. 428, 12 N. W. Rep. 640; McKinnon v. McEwan, 48 Mich. 106, 11 N. W. Rep. 828; Malthy v. Plummer, 71 Mich. 579, 40 N. W. Rep. 3; Petrie v. Lane, 58 Mich. 527, 25 N. W. Rep. 504. The defendant relies especially upon Leonard v. Beaudry, 68 Mich. 312, 36 N. W. Rep. 88, 80 Mich. 163, 45 N. W. Rep. 66, in support of his contention that he was entitled to show the profits that he might have made in the mill if it had been finished within 10 days. But in Leonard v. Beaudry, *supra*, and in Atkinson v. Morse, 63 Mich. 276, 29 N. W. Rep. 711, there was a breach of contract, where the difference between the cost of doing the work to be performed and the contract price would be the measure of damages. The profits in such a case we held could be ascertained with reasonable certainty. This case seems to fall within the other line of cases where the uncertain and speculative profits of a mill from day to day are endeavored to be measured; where there is no certain amount of work contracted to be done at a certain or fixed price for the work, but where the mill owner must depend upon how much custom he may happen to have, and many other contingencies, as pointed out in the cases above cited. But upon examination of the authorities, and upon principle, I am satisfied that the defendant was entitled to show in reduction of plaintiff's claim the value of the use of the mill while it was compelled to lie idle by the failure of plaintiffs to complete the contract within the time specified. A denial of this right would be rank injustice, and leave the defendant remediless for his loss; and at the same time

compel him to pay the full value of the machinery and repairs to the plaintiff, the same as if the work had been done within the time agreed upon. "As a general rule the expected profits of a business cannot be proved, and therefor cannot be recovered. They might have been made and they might not. Hence, in such cases, the measure of damages is not the expected profits, but the value of the use of the property or business, and to ascertain this, evidence of actual past profits must be admissible." Sedg. Dam. (8th ed.) par. 174. "Rent is given, not as a specific damage, but as a fair average measure of compensation." Sedg. Dam. (8th ed.) par. 186; Sinker v. Kidder, 123 Ind. 528, 24 N. E. Rep. 341; Crawford v. Parsons, 63 N. H. 438; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813; Bostwick v. Losey, 67 Mich. 554, 35 N. W. Rep. 246; Griffin v. Colver, 16 N. Y. 489-496. In the present case, the failure to put in the machinery and make the repairs within the ten days naturally resulted in the stopping of the mill while the machinery was being put in. The defendant expected to shut down his mill for 10 days, but under his statement of the agreement the work was to be finished within that time. If so, he was compelled to keep his mill idle for some time beyond the 10 days, because of the fault of the plaintiff in not fulfilling its contract as to the time of performance. His damages are the value of the use of the mill while it was so kept idle by the plaintiff's fault. This is not an allowance of the profits which, in this particular case, might have been made, but of the average sum, represented by rent which the property was worth. 1 Sedg. Dam. (8th ed.) par. 190; 2 Suth. Dam. 490.

When a contractor undertakes to perform a contract to put a mill or other machinery in operation he ought to be holden to idemnify the other party against the loss of the use of the mill or machinery after the expiration of the time for the performance of the contract. See Davis v. Talcot, 14 Barb. 611-628; Brown v. Foster, 51 Pa. St. 165; Abbott v. Gatch, 13 Md. 314; Green v. Mann, 11 Ill. 613; Rogers v. Bemus, 69 Pa. St. 432; Willey v. Fredericks, 10 Gray, 357; Benton v. Fay, 64 Ill. 417; Griffin v. Colver, 16 N. Y. 489. In Abbot v. Gatch a new mill was erected, but not in the time agreed upon. The uncertainties of the milling business were considered too great to allow prospective profits as damages, but the measure of damages was held to be the fair rental value of the mill. In Green v. Mann, the lessor of the mill agreed to put in two additional run of stone, but failed to do so. The measure of damages was held not to be the expected profits from the use of the stone in the business, but the fair value of the use of the two run of stone. In Rogers v. Bemus the profits of a new mill, not erected within the time agreed upon, were held to be too remote, contingent, and speculative; but it was said that the fair rental value of the mill was the true measure of the damages. In a late case in Iowa—Brownell v. Chapman, 51 N. W. Rep. 249—this matter was carefully considered. The plaintiff sued to recover the price of boilers furnished for a pleasure boat at a summer resort to the proprietor of the resort. The defendant put in a counter-claim for damages caused by the failure of plaintiff to deliver the boilers within the time agreed upon. It was held that the measure of defendant's damages was the rental value of the boat, and not the interest on the capital invested therein for the time defendant was deprived of its use. The court refer to the cases of Allis v. McLean, 48 Mich. 428, 12 N. W. Rep. 640, and Taylor v. Maguire, 12 Mo. 313, as not in harmony with this holding, but say that they are clearly overborne by the weight of other cases and the current of authority. Mr. Sedgwick also says that the case of Allis v. McLean "would hardly be followed." 1 Sedg. Dam. (8th ed.) § 186. In Allis v. McLean, after discussing the question of prospective profits, and ruling that they could not be shown as damages, Judge Cooley says: "But this case is thought to be different, because here the fair rental value of the mill is proved, and it is said that this was certainly lost. But we do not know that that was the case. If the mill had been in condition to rent at that time, there may have been no customer for it on terms the owner would have consented to grant; and, if customers were abundant and satisfactory, it cannot be assumed that the whole rental value is lost when a mill stands idle. The wear and tear of machinery and buildings in use is something, and it is not improbable that the landlord would take this, among other things, into account in determining what should be the rent. But in this case it does not appear that rent was lost or could have been lost, for it is not shown that defendants desired to rent, or would have consented to do so, if a customer had offered. In fact, the contract is clearly inferable." The exact point thus ruled in Allis v. McLean has never since been before this court; yet in two cases—Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813, and Bostwick v. Losey, 67 Mich. 554, 35 N. W. Rep. 246—the value of the use of a mill has been permitted to be shown as the measure of damages. In the first case the injury complained of was the unlawful holding back and diverting the waters of a river, thereby preventing plaintiff from using his mill. It may be claimed that, as this was an action in tort, there is no analogy between this case and Allis v. McLean. But in Bostwick v. Losey, the action was in *assumpsit*. Plaintiff sued for the rent of a saw-mill. Defendant pleaded that plaintiff had agreed to make certain repairs, but failed to keep such agreement, to his damage, and sought to recoup such damages against plaintiff's claim. This court said in that case: "The failure of water-power was the grievance complained of. The defendants were entitled to the use of it, as they would have been had the flumes been kept in repair, for saw-mill purposes. The value of the use of such water-power for such purposes was shown by witnesses. We do not consider that such value was speculative or uncertain, or that showing such value, and allowing it as the basis of damages, was in effect permitting the profits of the saw-mill to be computed in estimating the damages. The contract or lease itself shows that this water-power had a rental value, and we can see no serious difficulty in the way of ascertaining to a tolerable and sufficient certainty the value of this use, to which the defendants were entitled by their agreement." The rule announced in Bostwick v. Dosey in principle applies to the case before us, and I see no reason why the value of the use of this flouring-mill cannot be ascertained in this case without serious difficulty and with sufficient certainty.

It being firmly established by the authorities that the prospective profits of a milling business are too speculative and uncertain to be used as a measure of damages, there would be no adequate remedy for the owner of a mill, in such a case as this, for a breach of contract that for a certain time would deprive him of the use of his property, if the case of Allis v. McLean is to be taken as authority in this State. This would be so manifestly unjust that, in so far as that case seems to hold that the fair rental value of a mill cannot be shown as damage in a case like the present, I think it should be distinctly overruled. It is not only

against the whole current of authority elsewhere, but it is opposed to equity and justice.

COMPULSORY PHYSICAL EXAMINATION IN DIVORCE AND CRIMINAL CASES.

Sec. 1. Divorce Cases.
Sec. 2. Criminal Cases.
Sec. 3. Witness Examined.

Sec. 1. *Divorce Cases.*—In divorce proceedings courts, upon a proper showing, have uniformly exercised the power of ordering the examination of either one or both parties. The cases in which this is done are applications for a divorce on the ground of impotency; and the reason for the exercise of the power is that "nature has provided no other means; and we must be under the necessity either of saying that all relief is denied, or of applying the means within our power. The court must not sacrifice justice to notions of its own." The court, which used this language, said: "If there is just reason, either to suspect the truth of the statement, or to think the injury inconsiderable, the court will hesitate before it descends to modes of proof which are painful." Then speaking of the age of the person to be examined, the court added: "The age is entitled to just consideration. The injury is very different from that which may occur in an earlier period of life, at a time of life when the passions are subdued, and marriage is contracted only for comfortable society. The exposure also of the person at an advanced stage of life may be felt with greater abhorrence, and complied with much more reluctance than in the case of a younger person." The court dismissed the petition, for it appeared that the husband was insincere in his statements for a divorce.[1] In an American case it was said by the court: "And I have no doubt as to the power of this court to compel the parties, in such a suit, to submit to a surgical examination, whenever it is necessary to ascertain the facts which are essential to the proper decision of the cause. But a lady will not be compelled to submit to a further examination when it appears that she has already submitted herself to the examination of competent surgeons, whose testimony can be readily obtained. Investigations of this kind are always indelicate, and the mode of proof to which resort must of necessity be had, must frequently be very distressing to the feelings of parties. It would, therefore, in most cases, be better that the party complaining, should submit to a disappointment, and by an amicable arrangement agree to separate, rather than to bring the cause before a court for its decision thereon." An examination of the woman defendant by matrons was ordered.[2]

In Newell v. Newell,[3] the court ordered an examination of the wife, even though she had been examined *ex parte* by her own physicians, and the husband, with the sanction of the court, was allowed to select the physicians; and she was also required to answer under oath interrogations touching her alleged incapacity, for the use of physicians. She also was permitted to have present such physicians as she desired. The court recommended the parties to agree upon the physicians, and to have them prepare interrogatories for the woman to answer, with a view to aid the physicians in arriving at a correct result. If they could not thus agree, the court said it would select the physicians, and frame the interrogatories by the aid of medical assistance. As the woman lived in another State the court ordered her temporary alimony to be withheld until she complied with the order of the court.

In Vermont the court considered that it had the power to order an examination on the ground that impotency was a cause for a divorce, and as that cause could not ordinarily be proved by witnesses, it would "amount to an absolute denial of justice," not to order it, "and that part of the statute making this a cause for nullifying a marriage, would be a dead letter." "Upon authority and reason," the court continued, "we are clearly satisfied that the power exists in the court to compel such examination, although the statute does not provide for it." The court appointed a commissioner to examine the husband under oath and to conduct an examination of his person, such commissioner

[1] Briggs v. Morgan, 3 Phila. 325, 1 Eng. Eccl. 405, 2 Hagg. Con. 324.

[2] Devanbagh v. Devenbagh, 5 Paige Ch. 509, 28 Am. Dec. 442.

[3] 9 Paige Ch. 25.

to select two or more physicians for that purpose.[4]

In Alabama the power of the court to order an examination was not doubted; but as the motion for it came after publication had passed, it was deemed a matter of discretion with the chancellor; and the exercise of that discretion was not reversible on error or appeal.[5]

In New Jersey the court held that it had full power to order an examination, but denied it in consideration of the wife's age, she being in her sixty-ninth year.[6]

In Canada the power to order an examination is exercised.[7]

In Ohio the power to order an examination was denied,[8] but by a recent decision, elsewhere referred to, no doubt any longer exists that the court possesses that power.[9] When the defendant refused to submit to an examination, his refusal taken in connection with the admissions in his sworn answer, that he had taken legal opinion on the validity of the marriage, coupled with his confession of non-consummation, a divorce was decreed.[10] So the admission of the defendant was used to supplement the examination of the physicians.[11] The court will not order an examination until the necessity for it is clearly shown.[12] The confessions of the party charged with impotency are always admitted, and are of considerable weight when he refuses to submit to an examination, and where there is no reason to suspect collusion.[13] Where the defendant had never been examined, and she could not be found, it being supposed she was out of the jurisdiction of the court, the decree was suspended in order to give the petitioner an opportunity of being examined if she could thereafter be found within the jurisdiction. There was no evidence of impotency.[14] Where the woman refused to submit to an examination, a motion for an attachment against her was ordered to stand over until after the hearing of the petition.[15] In a recent Alabama case an examination of the complainant was decreed to be made either by physicians or by matrons skilled in such matters, to be appointed by the chancellor, and proof of such examination by the persons so appointed, showing that the default was not with her, was made an indispensable condition of relief. If she refused to submit to the examination, her bill was ordered to be dismissed. The defendant was also ordered to submit to the examination as a condition of his right to combat the right of the complainant.[16] In Michigan the power of the court to enforce such examinations is stoutly denied, the court saying: "It should be understood that there are some rights which belong to man as man, and to woman as woman, which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."[17]

Sec. 2. *Criminal Cases.* — In criminal cases constitutional provisions must be considered in determining whether a defendant can be compelled to submit to an examination; such provisions as "no man ought to be compelled to give evidence against himself." or "no person, in any criminal prosecution, shall be compelled to testify against himself," or "no man, in a court of common law, shall be compelled to give evidence criminating himself," and the like. In North Carolina it was held that the court had no right to compel the defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro.[18] But

[4] Le Barron v. Le Barron, 35 Vt. 364.

[5] Anonymous, 35 Ala. 226.

[6] Shafto v. Shafto, 28 N. J. Eq. 34.

[7] Darrow v. Laurent, 17 L. Cas. Jur. 324.

[8] 2 West Law Jour. 131.

[9] Simmons v. Green, 35 Ohio St. 104.

[10] Harrison v. Harrison, 4 Moore, P. C. 96, s. c., 3 Curt. Eccl. 1; 7 Eng. Eccl. 357.

[11] Cumyns v. Cumyns, 2 Phil. 10, s. c., 1 Eng. Eccl. 165. An inspection in Aleson v. Aleson, 2 Lee, 576, was denied, because there had not been a triennial cohabitation.

[12] Anonymous, Deane & Sw. 295.

[13] Pollard v. Wybourn, 1 Hagg. Eccl. 725, 3 Eng. Eccl. 308.

[14] T. & M. 1 P. & D. 31.

[15] B. & L. 1 P. & D. 639. Other cases showing the practice of the English courts in these examinations are as follows: D v. A, 1 Robt. Eccl. 279; H v. C, 1 Sw. & Tr. 605; Essex v. Essex, 2 How. St. Tr. 786 (an examination of a woman by matrons); S v. E, 3 Sw. & Tr. 240; M v. H, 3 Sw. & Tr. 517; M v. B, 3 Sw. & Tr. 550; F v. D, 4 Sw. & Tr. 86; L v. H, 4 Sw. & Tr. 115; W v. H, 2 Sw. & Tr. 240; Serrell v. Serrell, 2 Sw. & Tr. 422.

[16] Anonymous, 89 Ala. 291, 7 South. Rep. 100. See the practice in this kind of cases in England, B. v. L, 16 W. R. 943.

[17] Page v. Page, 51 Mich. 88.

[18] State v. Jacobs, 5 Jones L. (N. C.) 259.

when the coroner compelled the accused to exhibit her hand, in order to determine her guilt or innocence, evidence of the condition of the hand as it was when exhibited was allowed to be given at the trial of the accused.[19] But where the condition of the accused's leg became material as a matter of identification, the lower part having been cut off, it was held error to compel him to exhibit it to the jury.[20] Nor can an accused be required to try on a shoe to determine whether tracks found at the scene of the offense were made by him.[21] Nor to put his foot in a pan of soft mud in order to compare the impression thus made with the foot — tracks found near the scene of the crime.[22] It is not error to require a witness to point out the accused who is present at the trial.[23] But an accused cannot be compelled to put his foot in footprints found near the scene of murder, for the purpose of identification.[24] When the defendant was charged with having murdered her illegitimate child at birth, it was held that the coroner could not send two physicians to the jail to examine her, and thus, against her will, forcibly obtain evidence of her guilt.[25] Notwithstanding these cases it has been held that the officers arresting the accused may compel him to put his foot in a track found near the place of the crime, and that they may testify as to the result of the comparison.[26] So it has been held that an accused can be compelled to lay bare his arm to see if it has certain marks upon it, for the purpose of identification.[27]

Sec. 10. *Witness Examined.*—On a criminal charge of rape, the prosecutrix being a child of seven and one-half years of age, the court held that it was not error to refuse to compel an examination of the child by physicians, in order to determine if she had been injured.[28]

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Indianapolis, Ind.

[19] State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1.
[20] People v. Mead, 50 Mich. 228.
[21] Blackwell v. State, 67 Ga. 76.
[22] Stokes v. State, 5 Baxt. 619, 30 Am. Rep. 72.
[23] State v. Johnson, 67 N. C. 55.
[24] Day v. State, 63 Ga. 667.
[25] People v. McCoy, 45 How. Pr. 216.
[26] State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595.
[27] State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530.
[28] McGuff v. State, 88 Ala. 147, 7 South. Rep. 35; Barnett v. State, 83 Ala. 40, 3 South. Rep. 612.

CORPORATIONS—STOCKHOLDERS' LIABILITY FOR TORTS.

RIDER V. FRITCHEY.

Supreme Court of Ohio, March 22, 1892.

1. The provision of the Ohio constitution (art. 13, § 3) making a stockholder individually liable for "dues of corporations" over and above the amount of unpaid stock owned by him, to a further sum at least equal in amount to such stock, being remedial rather than penal, extends not only to a debt arising from contract, but as well to a demand for damages arising from a tort.

2. The court will take judicial notice that no statute authorizing the incorporation of a street railroad company was in existence before the adoption of the present constitution of Ohio, and an allegation that such a company is "duly incorporated under the laws of Ohio" is a sufficient averment that it was incorporated since the adoption of the constitution, and imposes the constitutional liability upon the stockholders.

SPEAR, C. J., delivered the opinion of the court: The action in the common pleas court was brought by defendant in error, a judgment creditor of the Fairwood Street-Railroad Company, a corporation, to enforce, on behalf of himself and all other creditors of the company, the statutory liability of stockholders. It was alleged in the petition that the "railroad company is a corporation duly incorporated under the laws of Ohio, * * * and was such corporation prior to the indebtedness hereinafter described." The petition further alleged the recovery, December 26, 1882, of a judgment by the plaintiff against the company for $1,263.64; the insolvency of the company at the time and since; and that the company had no property subject to execution; also that the judgment was in full force and unsatisfied, save a payment thereon of $211.40, June 19, 1883. It was further averred that plaintiff's cause of action upon which the judgment was rendered was a claim for damages for negligently causing the death of plaintiff's intestate, April 7, 1872. The names of those claimed to be stockholders were set out, with the amount of stock claimed to be held by each. In this list was the name of Fannie Peck, who, it was alleged, was the owner of 55 shares. The usual prayer followed. By an amended petition filed October 25, 1886, the plaintiff in error was made a party, as to whom it was therein alleged that he was the assignor of the shares of stock standing in the name of Fannie Peck, (who was at the beginning of the suit, and still is, insolvent), the assignment having been made between the years 1878 and 1880. Answer was interposed by plaintiff in error setting up the statute of limitations of six years, to which a reply was filed denying the same. Such further proceedings were had that at the April term, 1887, final judgment was rendered, in which the court found the names of the creditors and amounts due each, the names of the stockholders liable, the amount of stock held by each, and the amount

each solvent stockholder should be assessed in order to pay the debts, costs, etc. This amount assessed was a little less than 50 per cent. of the full statutory liability of each solvent stockholder. The plaintiff in error was one of those so assessed, the judgment against him being for $1,269. Error was prosecuted to the circuit court, where the sole ground urged was that the petition did not set forth a cause of action, and the judgment was erroneous because the individual liability of stockholders is incident only to such demands against the corporation as arise out of its contracts, not extending to such as sound in tort. The judgment of the common pleas was affirmed by the circuit court.

A preliminary question arises upon an objection made by defendant in error that, because the plaintiff in error has brought into this court as defendant only the plaintiff below, the court cannot have jurisdiction for want of necessary parties. If it were sought to reverse the judgment below on a point of error applicable solely to the plaintiff in error, there might be force in this objection. But, if the petition does not make a case against any of the alleged stockholders, it cannot prejudice the defendant in error that the other parties below are not parties in this court. The petition is attacked here on two grounds: (1) That it is insufficient for want of an averment that the street-railroad company was incorporated since the adoption of the constitution of 1851; (2) that there can be no liability in the present case against stockholders, because stockholders are not liable for obligations of the corporation growing out of torts.

1. In support of the first proposition, the argument is that, in order to maintain the petition, it must be held that stockholders in all corporations incorporated under the laws of Ohio are liable for the debts or liabilities of the corporation, which cannot be, for the reason that as to many, if not all corporations organized prior to the adoption of the present constitution, no statutory liability whatever was imposed on stockholders. Hence an allegation such as is contained in the petition in this case, that the "company is a corporation duly incorporated under the laws of the State of Ohio," is not an allegation of organization under a law which imposes liability upon stockholders. The point is one of some nicety, but we are not impressed with its sufficiency. It will be noted that no demurrer was interposed by the plaintiff in error to the petition. On the contrary, he answered and went to trial. He filed no motion for new trial, took no bill of exceptions, nor did he ask a special finding of facts. The attention of the trial court was not called to this alleged defect in the petition, nor does it appear to have been urged in the circuit court. Indeed, it is stated in defendant's brief, and not denied, that, upon the argument in the last named court, it was conceded that the company was incorporated under the act of April 10, 1861, which act imposes liability in the indentical terms of the constitution. It would appear that the party is rather late in making this objection, especially as he has apparently suffered no prejudice. However, waiving this, we think it proper to judicially notice that no statute existed prior to the adoption of the present constitution authorizing the incorporation of a street-railroad company, and, having in mind the duty enjoined by our Code, to construe pleadings liberally in order to assist the parties in obtaining justice, we are of opinion that the allegation that the "company is a corporation, duly incorporated under the laws of the State of Ohio," is a sufficient averment that it was incorporated under a law enacted since the adoption of the present constitution; and, as no such statute would have been valid which did not impose the constitutional liability (State v. Sherman, 22 Ohio St. 411), and as it is not to be assumed that the legislature would enact an invalid statute, the further conclusion would follow that the company was incorporated under a law which did subject stockholders to liability for obligations of the corporation.

2. A more serious question arises with respect to the second point. Can the stockholders of an Ohio corporation be held for obligations of the corporation growing out of torts? It follows, from what has already been stated, that we must assume that this street-railroad company was organized under a law which imposed upon stockholders just such liability as the constitutional provision requires. We look, therefore, to the constitution as our guide. The provision (section 3, art. 13) is: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." The question turns upon the import of the word "dues." It has been contended that provisions creating individual liability on the part of the stockholders are in derogation of the common law, and are therefore to be construed strictly. Authorities in support of this rule are not wanting, and, in so far as such liability is attached by way of penalty for the omission of some act required by the statute, as in some of the States, it is probable that the weight of authority favors the proposition. But all concede that this is a remedial provision, and to hold that there must be applied to it the same test as if it were a penal law is to hold that all remedial laws must be so construed, for every remedial law must of necessity be in derogation of the common law. Where the provision is simply remedial, though it does impose an obligation which did not attach at common law, we see no reason to insist upon what is called a strict construction, but believe that the ordinary rule, which requires the court to inquire simply as to the intent of the law-makers, reading the provisions as they were intended to be read, will best attain the ends of justice. This

leads us to look to the intent of the section quoted. Speaking in general terms, it must be manifest that the intent to provide that those who derive advantage from the authority of the State, given by our incorporation laws, shall, at the same time, assume responsibility for the acts of the artificial creature which they have called into legal being, affecting the rights of others. Having in mind this general intent, and the provision being remedial, it should, we think, be construed with a view to remove the evil and extend the benefit proposed.

It is conceded that, if a cause of action for a tort can be treated as a "debt," the liability of the stockholders for it would follow. The affirmative of this is asserted, and the following authorities are cited in its support: Carver v. Manufacturing Co., 2 Story, 432; Milldam Foundrey v. Hovey, 21 Pick. 417; Grey v. Bennett, 3 Metc. (Mass.) 522; Smith v. Omans, 17 Wis. 395; and White v. Hunt, 6 N. J. Law, 418. To the contrary of this, counsel for plaintiff in error cite: Bohn v. Brown, 33 Mich. 257; Cable v. McCune, 26 Mo. 371; Doolittle v. Marsh, 11 Neb. 248, 9 N. W. Rep. 54; Heacock v. Sherman, 14 Wend. 59; Archer v. Rose, 3 Brewst. 264; Child v. Iron-Works, 137 Mass. 516; Cook, Stocks, 220; Mor. Priv. Corp. 608, 613; Manson v. Jacob, (Mo. Sup.) 6 S. W. Rep. 251; Evans v. Lewis, 30 Ohio St. 14; Crouch v. Gridley, 6 Hill, 250; Kellogg v. Schuyler, 2 Denio, 73; and Zimmer v. Schleehauf, 115 Mass. 52. A review of these authorities would be important if a holding upon the proposition were necessary to a decision of the case before us. We think it is not.

It would seem to be the undoubted duty of the court to give the word "dues," as found in the section quoted, such construction as will secure the apparent object of the constitution makers in its adoption. Constitutions are necessarily couched in terse language, and we look there for the use of words in a broad, comprehensive sense. This term "dues" is of extended import. Among other definitions, Latham gives the singular: Owed; capable of being justly demanded; that which may be justly claimed. Worcester: That which any one has a right to demand. Webster: That ought to be paid or done to or for another; justly claimed as a right or property; fulfilling obligation; that which belongs or may be claimed as a right; whatever custom, law, or morality requires to be done; right, just title, or claim. Bouvier defines it as what ought to be paid; what may be demanded. It seems natural to say that, where one is injured by the negligence of another, reparation is due. This implies a legal demand for reparation, and in Heacock v. Sherman, *supra*, Justice Nelson admits that the word "demand" found in the New York statute, if it stood alone, would be broad enough to include a cause of action for a tort. It is difficult to see any reason why the framers of the constitution should intend to afford one who gives credit for goods or money to a corporation a right to demand compensation of the stockholders in case of insolvency, and deny a like right to one who intrusts it with the care of his person, as in the case of a passenger, or to one, even a stranger, who, without fault on his part, is injured by the negligence of the corporation's agents. It may well be asked, are the rights of things more sacred than the rights of persons? Is there any rule of public policy which would justify the protection of rights arising *ex contractu*, which would not equally call for protection of rights arising *ex delicto*, or any claim for unliquidated damages? Suppose, as is suggested by Mr. Justice Story, in illustrating his propositions in Carver v. Manuf'g Co. *supra*, a contract by a corporation to manufacture goods of a particular quality or character, or to employ workman, to be wholly broken, so that the right of the injured party would be, not to money, but to unliquidated damages; if these would be without the purview of the statute, it would have a very narrow and inadequate range. Or suppose a manufacturing corporation obstructs its neighbor's mill privilege, or stop his works by back flowage; we see, at once, that an insolvent corporation might do irreparable mischief without any just redress. Or suppose an insolvent corporation should unlawfully convert 1,000 bales of cotton belonging to a third person; the mischief could be redressed only by an action of trover for unliquidated damages, and if the individual operators were not liable, after an unsatisfied judgment, the statute would be little more than a delusion. A narrow construction would exclude recovery in all these cases; a broad liberal construction, such as should be given to a remedial provision, would afford relief, and thus attain the object which, it would seem, was in the contemplation of the lawmakers. As conclusion we are of the opinion that the word "dues" should receive a beneficial construction,—one which will include within its scope as well as a demand for unliquidated damages for a tort as a claim for a debt arising upon contract.

The plaintiff in error was the owner of stock in this insolvent corporation while the action was pending against it. Being a claim for which liability attached to the stockholders, as we have found, it rested upon him to an amount equal to his stock. Before the judgment was rendered he assigned his stock to one who at the beginning of the present suit and at the time of trial was insolvent. He could not thus shift the responsibility. The question involved in this case as to the meaning of the term "dues" was not before the court in either Evans v. Lewis, 30 Ohio St. 14, or Brown v. Hitchcock, 36 Ohio St. 667, and we do not understand our conclusion to be inconsistent with the decision in either of those cases. In the court of common pleas a counsel fee was taxed for plaintiff below, and the same was included in the judgment as part of the costs. This was manifest error; but, inasmuch as defendant in error has since the argument remitted the amount, no further notice need be given it. Other grounds of

error are alleged. An inspection of the record fails to satisfy us that either is well taken.

Judgment affirmed.

NOTE.—Whether statutory provisions creating an individual liability of stockholders for corporate debts must be construed strictly is a question upon which there is considerable conflict of authority. Said Chief Justice Shaw, of Massachusetts, in Gray v. Coffin, 9 Cush. 199: Any individual liability of stockholders for corporate debts "is a wide departure from established rules of law, founded in consideration of public policy, and depending solely upon provisions of positive law. It is therefore to be construed strictly and not extended beyond the limits to which it is plainly carried by such provisions of statute." So it was held, in a later case in that State, that such liability did not survive as a cause of action against the executor of the stockholder. Dane v. Dane Mfg. Co., 14 Gray, 488. See also Ripley v. Sampson, 10 Pick. 371. In Pennsylvania, a provision making stockholders liable for "debts due to mechanics, workmen and laborers employed by said company," has been held to be in derogation of the common law and to be strictly construed. Moyer v. Pennsylvania State Co., 71 Pa. St. 293. See also McMullin v. McCreary, 54 Pa. St. 230; Means' Appeal, 85 Pa. St. 78. The New York Court of Appeals, in Chase v. Lord, 77 N. Y. 1, 6 Abb. N. Cas. 258, adopted the view of Chief Justice Shaw in Gray v. Coffin, *supra*, and held that a provision making the corporators liable until the whole amount of capital subscribed was raised and paid in and a certificate of that fact filed, did not fix a liability which continued until the whole amount of capital was subscribed and paid in.

The theory of all these cases is that the liability is purely the creation of the statute, and imposed on the stockholder by the legislative will. In pursuance of this idea, it has been held in Maine that the repeal of the statutory liability does not impair the obligation of a contract, there being no privity of contract between the creditors and the individual stockholders. Coffin v. Rich, 45 Me. 507. This view is very generally accepted in the New England States. Compare Halsey v. McLean, 12 Allen, 438; Rice v. Hosiery Co., 56 N. H. 114; Erickson v. Nesmith, 4 Allen, 326, 15 Gray, 221; New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349; Andrews v. Bacon, 38 Fed. Rep. 777; Knowlton v. Ackley, 8 Cush. 93, 96; Libby v. Tobey, 82 Me. 397, 19 Atl. Rep. 904.

The better view seems to be that the liability is contractual in its nature; that the statute in creating the corporation and establishing regulations for its government, prescribes the terms upon which the subscribers to its capital stock may become members, and that the subscription of the member is a voluntary undertaking on his part, and his obligation arising under that undertaking is contractual rather than statutory. Hawthorne v. Caleb, 2 Wall. 10; Conant v. Van Schaick, 24 Barb. 87; Prov. Sav. Inst. v. Jackson Place, etc. Rink, 52 Mo. 552; St. Louis Ry. Sup., etc. Co. v. Harbine, 2 Mo. App. 132; Blakeman v. Benton, 9 Mo. App. 107; Hodgson v. Cheever, 8 Mo. App. 323; Bagley v. Tyler, 43 Mo. App. 195; Corning v. McCullough, 1 N. Y. 47; Manville v. Edgar, 8 Mo. App. 314. Compare Bird v. Hayden, 1 Robt. (N. Y.) 383.

Whether or not a statute creating an individual liability for corporate debts will be regarded as penal rather than remedial in its nature, is another question, or rather another form of the same question. For if it is penal it will very properly be strictly construed, and if remedial it will be construed beneficially to effect the purpose aimed at. In Atwood v. Rhode Island Agri. Bank, 1 R. I. 376, 386, the words "personally and individually liable for all losses, deficiencies and failures of capital stock of said bank," were held to create a liability to creditors, and not simply to vest the corporate authorities with power to keep the stock good by assessments. The provision must therefore be regarded as remedial. In Van Hook v. Whitlock, 2 Edw. Ch. 304, 310, the court said of a provision in the charter of a bank making the stockholders liable for debts remaining unpaid upon the expiration of its charter: "I do not think § 12 of the charter or act of incorporation of the company is to be regarded in the light of a penal statute. It imposes no penalty or forfeiture upon the stockholders or corporators for suffering the debts of the corporation to remain unpaid at the expiration of its charter. Still it declares in respect to all debts contracted by the corporation before this period, that the persons composing the corporation at the time of its dissolution shall, to a certain extent, be responsible in their individual and private capacities. Without this express enactment they would not be thus responsible. The property and effects of the corporation only would be liable to be applied to the payment of its debts; and should this prove insufficient, then the creditors would go unpaid. In order to remedy this inconvenience, and as a matter conducive to the ends of justice and the rights of creditors, the legislature thought proper to create a personal responsibility on the part of the corporators; and thus the statute becomes a remedial one in the proper and legal sense of the term. For other instances of remedial legislation on this subject, see also Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 605; Garrison v. Howe, 17 N. Y. 458.

But when the statutory provision fixes the stockholders' liability by way of a penalty for some violation of the regulations prescribed for the government of the corporation, the court will follow the general rule which requires a strict construction of penal statutes. For instance, it was so held under a statute providing that upon the failure of the company to publish an annual notice of the amount of the existing debts of the corporation, the stockholders should be jointly and severally liable for all such debts then existing (Cable v. McCune, 26 Mo. 371); for failure to publish annually a certificate of all assessments voted and paid in (Sayles v. Brown, 40 Fed. Rep. 8); under a law making stockholders liable for the amount of notes issued, in a form and with the design to circulate as money. Lawler v. Burt, 7 Ohio St. 340. For similar cases of the liability of officers of corporations, see Sturges v. Burton, 8 Ohio St. 215; Kirtzer v. Woodson, 19 Mo. 327; Bird v. Hayden, 1 Robt. (N. Y.) 383.

WM. L. MURFREE, JR.

CORRESPONDENCE.

JUDGMENTS IN REM.

To the Editor of the Central Law Journal:

While Mr. Owen in No. 16 of the JOURNAL has presented to its readers a very readable article on the above subject, he has nevertheless, like most writers on the subject, failed to make clear why a judgment *in rem*, even the best example, is conclusive on all the world, quoting from Woodruf v. Taylor, 20 Vt. 65, which I regard the leading case on the point in the

country, for it is a very exhaustive opinion, and the doctrine laid down was approved by the Supreme Court of the United States in Winsdor v. McVeigh, 93 U. S. 274. He says: "The judgment is upon the thing itself, and when the proper steps required by law are taken the judgment is conclusive, and makes the instrument as to all the world just what the judgment declares it to be." Proper steps required by law in such cases may be taken and still the judgment would not be binding on all the world. The case cited is a leading one to the effect that what makes a judgment *in rem* binding on all the world is, that in such cases a public notice is always given, and is a constructive notice to all the world. "It is indeed just as essential to the validity of a judgment *in rem* that constructive notice be given that actual notice should appear upon the record of a judgment *in personam*. Woodruf v. Taylor, *supra*." "The theory upon which a judgment *in rem* is binding on all the world is that all the world have constructive notice of the action." Fisher v. McGier, 1 Gray 1-57; Sheridan v. Ireland, 61 Me. 486. It is only where all the world are made parties to the action that a judgment *in rem* is binding on all the world.

E. C. BETTS.

Minneapolis, Minn.

BOOKS RECEIVED.

CLARENDON PRESS SERIES: The Contract of Sale in the Civil Law with Reference to the Laws of England, Scotland and France. By J. B. Moyle, D. C. L. of Lincoln Inn, Barrister-at-Law and Fellow and Tutor of New College, Oxford. Oxford: At the Clarendon Press. 1892.

THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES. By Dr. H. Von Holst, Professor at the University of Freiburg. Translated from the German by John J. Lalor. 1859-1861. Harper's Ferry-Lincoln's Inauguration. Chicago: Callaghan and Company. 1892.

A TREATISE ON THE LAWS REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LIQUORS. By Henry Campbell Black, M. A., Autnor of "Black's Law Dictionary" and of Treatises on "Judgments," "Tax Titles," "Constitutional Prohibitions," etc. St. Paul, Minn. West Publishing Company. 1892.

LAWYERS' REPORTS, ANNOTATED. Books XIII and XIV. All Current Cases of General Value and Importance decided in the United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Burdett A. Rich, Reporter. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1892.

MINING RIGHTS IN COLORADO. Lode and Placer Claims, Possessory and Patented, from the District Organizations to the Present Time. Statutes in Full, Prospecting, Land Office, Incorporations, Forms, Decisions, etc. By R. S. Morrison, of the Colorado Bar. Seventh Edition. Revised and Enlarged. Denver: Chain & Hardy Co. 1892.

AMERICAN RAILROAD AND CORPORATION REPORTS: Being a Collection of the Current Decisions of the Courts of Last Resort in the United States; Pertaining to the Law of Railroads, Private and Municipal Corporations, Including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and Annotated by John Lewis, Author of "A Treatise on Eminent Domain in the United States." Volume IV. Chicago: E. B. Myers and Company, Law Publishers. 1892.

A TREATISE ON EQUITY JURISPRUDENCE, as Administered in the United States of America; adapted for all the States and to the Union of Legal and Equitable Remedies under the Reformed Procedure. By John Norton Pomeroy, LL.D. Second Edition, By Carter Pitkin Pomeroy and John Norton Pomeroy, Jr., of the San Francisco Bar. In Three Volumes. Vols. I, II and III. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1892.

A TREATISE ON THE LAW OF DAMAGES BY CORPORATIONS, including cases *Damnum Absque Injuria*. In two volumes. An appendix to Volume II contains the Several Statutes Relating to Injuries Resulting in Death. By George E. Harris, of the Washington, D. C. Bar, Late Attorney-General of Mississippi, One of the Reporters for the Supreme Court, Mississippi, Author of "Harris' Contract of Married Women" and "Harris' Law of Subrogation." Volumes I and II. The Lawyers' Co-operative Publishing Co., Rochester, N. Y. 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADVERSE POSSESSION — License.—Where the community property of a husband and his wife was sold after the wife's death, and the purchaser thereby acquired a half interest in the land, the other half remaining in the children, and there was conclusive evidence that the husband obtained such purchaser's permission to remain in possession, such possession cannot be deemed adverse to the purchaser and those claiming under him.—*Evans v. Beriocher*, Tex., 19 S. W. Rep. 158.

2. ANIMALS—Agister's Liens.—One who feeds and cares for live-stock under a contract with the owner has an agister's lien upon such stock for the keeping, and the owner cannot take possession of the same, by replevin or other legal process, until he has paid or tendered the full amount of such lien.—*Kroll v. Ernst*, Neb., 51 N. W. Rep. 1033.

3. ANIMALS — Estrays—Pounds.—Cattle released from an enclosure where they were confined without the knowledge and consent of the owner, and immediately searched for by him, are not animals "running at large," within the meaning of the statute of March 7, 1887.—*Stephenson v. Ferguson*, Ind., 30 N. E. Rep. 714.

4. APPEAL — Notice to Copartners. — Under Rev. St. 1881, § 635, which provides that, where an appeal is taken by a part of several co parties, "they must serve notice of the appeal upon all the other co-parties," such notice is essential to validity of the appeal.—*Hutts v. Martin*, Ind., 30 N. E. Rep. 698.

5. APPEAL FROM HIGHWAY COMMISSIONERS.—Where proceedings for laying out a highway were had before the board of commissioners without objection, on appeal to the circuit court there was no abuse of discre-

tion in refusing to permit a remonstrance to be filed on an affidavit showing that the attorney employed by the remonstrator employed another attorney to appear and make the proper defense before the commissioners, and that such attorney neglected to do so.—*Indianapolis D. & W. Ry. Co. v. Hood*, Ind., 30 N. E. Rep. 705.

6. ARBITRATION AND AWARD. — Where a submission to arbitration provided for the concurrence of the three arbitrators, a recovery cannot be had on the award signed by only two, though the third, while refusing to sign, stated that "it was all right."—*Weaver v. Powell*, Penn., 23 Atl. Rep. 1070.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Fraud.—The fact that creditors claim and receive their *pro rata* of the fund in the hands of an assignee, in a suit by him to settle his trust, does not estop them from seeking to subject to their claim goods which had been sold by the assignee, on the ground that the purchaser had, though buying them in his own name, in fact bought them for and with the money of the debtor, such suit not being determinative of the title of the purchaser.—*Rothchild's Admr. v. Kohn*, Ky., 19 S. W. Rep. 180.

8. ASSUMPSIT—Commissions to Agent.—An action by an agent against his principal for commissions is not an action for money had and received, but for money due; and an allegation in the complaint in such an action, that the principal has collected the proceeds of sales made by the agent and has appropriated them to his own use, does not charge a conversion.—*Park v. Mighell*, Wash., 29 Pac. Rep. 556.

9. ATTACHMENT — Jurisdiction.—Where a statutory cause for an attachment in an action of contract is made to appear to a court of original jurisdiction in which an action is pending by filing the necessary affidavit and giving a sufficient undertaking, such court thereby acquires jurisdiction and may issue an attachment.—*Strickler v. Hargis*, Neb., 51 N. W. Rep. 1039.

10. ATTORNEY AND CLIENT—Compensation.—Where an attorney agrees to collect a claim, pay the costs, and accept as compensation one-half of the amount collected, and his client notifies him of an opportunity to make the collection, and he declines to resort to it because of the expense involved, the client may make the collection without being liable to the attorney for any compensation.—*Pennington v. Underwood*, Ark., 19 S. W. Rep. 108.

11. BANKS—Application of Payments.—Where a bank became assignee of a lessor, and held certain securities of the lessees, which it collected and sought to apply on the rent, *held*, that it had no lien upon such securities for the rent, and could not apply the same in payment of the rent without the lessees' consent.—*Buffalo County Nat. Bank v. Hanson*, Neb., 51 N. W. Rep. 1035.

12. BOUNDARIES.—Where there is a variance between the plat and the field-notes of the original survey of public lands, the former must control, since it represents the lines and corners as fixed by the surveyor general, and by which the land was sold.—*Beaty v. Robertson*, Ind., 30 N. E. Rep. 706.

13. BOUNDARIES—Evidence.—It is a general rule, when identifying boundary lines, that fixed and known monuments or objects, called for in a description found in a deed of conveyance, must prevail over given courses and distances; the order of application being—first, to natural objects; second to artificial marks; and, third, to courses and distances.—*Yanish v. Tarbox*, Minn., 51 N. W. Rep. 1051.

14. CARRIERS—Goods.—One of two railrord routes by which express matter might be forwarded to R terminated at D. Goods were expressed to R "via D:" *Held*, that the word "via" did not designate a terminal point, and that the express company was liable for detaining the goods at D without notifying the consignee at R, for if there was no public carrier from D to R, it was the duty of the company to carry the goods to the nearest available point, and then notify the consignee. —*Denver & R. G. R. Co. v. De Witt*, Colo., 29 Pac. Rep. 524.

15. CERTIORARI—Courts.—In an application for a writ of *certiorari* to the county court to review an order directing an election for a change of the county seat, where it was shown that the court acquired jurisdiction of the subject-matter, the writ was properly refused, though there might have been minor errors in the proceedings.—*Summerrow v. Johnson*, Ark., 19 S. W. Rep. 114.

16. CHATTEL MORTGAGES — Priority.—The holder of a senior chattel mortgage is under no obligation as to diligence in acquiring possession of the property upon the maturity of his mortgage, as against one who after the maturity of the mortgage, but with knowledge of its existence, takes another mortgage as a security, merely for a pre-existing debt.—*Cassidy v. Harrelson*, Colo., 29 Pac. Rep. 525.

17. COMMERCIAL AGENCIES—Representations as—Estoppel.—The right of the patrons of a commercial agency to claim an estoppel, as against a person who has made statements and representations to such agency relating to his own business affairs or the affairs of any concern with which he is connected, is not general, but is limited and confined to the parties for whom such statements and representations were intended when made, namely, those patrons who have occasion to apply, and who have applied and received a report relative to the person or concern in question.—*Irish-American Bank v. Ludlum*, Minn., 51 N. W. Rep. 1046.

18. CONSTITUTIONAL LAW — Municipal Ordinances.—The legislature may delegate to municipal corporations power to adopt and enforce ordinances on matters of special local importance, though general statutes exist relating to the same subjects. The same act may constitute a crime against the public law of the State, and also a petty offense against a municipal regulation. The two offenses in such case being different, each may be punished without violation of the constitutional inhibition against placing one twice in jeopardy for the same offense.—*McInerney v. City of Denver*, Colo., 29 Pac. Rep. 516.

19. CONSTITUTIONAL LAW—Title of Acts.—The reason for the rule that duplicity in the title and in the law is fatal to the law is the inability of the court to determine which of the different subjects named the legislature intended as the subject of the law, and when the reason fails the rule fails, and so the rule applies only where such inability actually exists.—*State v. Becker*, S. Dak., 51 N. W. Rep. 1018.

20. CONTRACT — Delay — Measure of Damages.—In an action by a subcontractor against a contractor for breach of contract in failing to have certain preliminary work done, thereby causing delay, and in refusing to allow plaintiff to perform a certain part of the work, loss of profits on the work plaintiff was not permitted to perform may be considered, but profits which plaintiff might have made as a contractor, but for the delay, doing some other work, cannot be considered.—*O'Connor v. Smith*, Tex., 19 S. W. Rep. 168.

21. CONTRACT — Parol Evidence.—Parol evidence of what was said or done before and at the time of making a written contract is not admissible to alter, vary, or contradict the express terms of the written contract.—*Smith v. Deere*, Kan., 29 Pac. Rep. 603.

22. CONTRACT—Sale.—The complaint, in an action of breach of contract of sale and purchase of hay, which obligated defendant, averred substantial performance by plaintiff, failure by defendant to receive at time and place of delivery, and, averring subsequent sale and the difference between contract and selling price, claimed to recover that loss as damages resulting from nonperformance: *Held*, that plaintiff had properly laid his case.—*Colorado Springs Live Stock Co. v. Godding*, Colo., 29 Pac. Rep. 529.

23. CONTRACT—Time of Completion.—At law, when the parties to a written contract have conditioned the payment of money upon the completion of certain work upon a building by a time fixed therein, time is of the essence of such contract. But if time is not held to be of the essence of the contract, and the parties have a reasonable time within which to perform, yet, the ques-

tion of reasonable time being one of fact, if found against the plaintiffs on the trial, they are concluded by it, unless this court can say that such finding is not supported by the evidence.—*Morrison v. Wells*, Kan., 29 Pac. Rep. 601.

24. COPYRIGHT—Damages for Infringement.—One who prints an infringing book under a contract with the publisher is liable, with the publisher, to account for the profits realized.—*Belford Clark & Co. v. Scribner*, U. S. S. C., 12 S. C. Rep. 734.

25. CORPORATIONS — Assignment.—Code 1881, ch. 143, providing for assignments by insolvent debtors, and that no assignment of any debtor otherwise than as therein provided shall be legal or binding as against creditors, does not include assignments by corporations, and a common-law assignment by an insolvent corporation is valid.—*Nyman v. Berry*, Wash., 29 Pac. Rep. 557.

26. CORPORATIONS — Directors.—In all elections for directors of a corporation created by or existing under the laws of Kansas, at least three of those chosen by the stockholders must be citizens and residents of the State.—*Horton v. Wilder*, Kan., 29 Pac. Rep. 566.

27. CORPORATIONS — Fraudulent Sale.—The secretary and one of the stockholders of a corporation whose business was unprofitable secretly agreed to purchase all the stock and the property of the corporation. Accordingly they purchased, in the names of third parties, all the stock, except that of complainant, who held a little more than one-third of the stock. A resolution was passed, against complainant's vote, authorizing the president and secretary to sell all the corporate property, which they accordingly sold to a nominal purchaser for the benefit of the secretary and said stockholder: *Held*, that said sale might be set aside as in fraud of complainant's rights.—*Chicago Hansom Cab Co. v. Yerkes*, Ill., 30 N. E. Rep. 667.

28. COUNTY BOARD—Injunction.—Before the board of county commissioners can be restrained by injunction from the performance of an act that is claimed to be unauthorized by law, and injurious to those seeking to prevent its performance, some steps must be taken by the commissioners, as a board, that are plainly indicative of their determination to do or perform the act complained of. Mere threats or declarations of intention to do or perform the act in question are not sufficient to constitute grounds for an injunction.—*Pierce v. Smith*, Kan., 29 Pac. Rep. 585.

29. COUNTY BOARD—Sureties.—A cause of action against the board of county commissioners of a county in favor of one who had been treasurer thereof, for an accounting and settlement of his accounts as such treasurer, cannot be joined with a cause of action in his favor against the sureties on his official bond, for wrongfully converting property deeded by him in trust for the protection of said sureties from loss, as sureties on said official bond.—*Rizer v. Board of County Com'r of Davis County*, Kan., 29 Pac. Rep. 595.

30. COUNTY TREASURER—Drainage—Taxes.—A person who is both county treasurer and treasurer of a special drainage district has no right, under said statute, to retain commissions on taxes levied by the drainage commissioners for current expenses and repairs, when such taxes are collected by the town collectors, and by them paid over to him, since he receives such taxes as treasurer of the district, and not as county collector.—*Mason County v. Commissioners, etc.*, Ill., 30 N. E. Rep. 676.

31. CRIMINAL EVIDENCE—Arson—Opinion Evidence.—It is incompetent for a witness to testify, upon a criminal trial against a defendant charged with arson, that "he thought the house was set on fire by some one;" but where all the evidence introduced tended to prove the burning of the house was accidental, or the result of carelessness, such opinion or belief so testified to is not sufficiently material or prejudicial to require a reversal of the conviction.—*State v. Nolan*, Kan., 29 Pac. Rep. 568.

32. CRIMINAL EVIDENCE—Conspirators—Declarations.—Where, in a trial for horse stealing, D and S were jointly charged with defendant, and a witness testified to facts showing a conspiracy between these parties, a statement made by D, as a co-conspirator, before the commission of the crime was complete, in the absence of defendant, was properly admitted in evidence against defendant.—*People v. Dixon*, Cal., 29 Pac. Rep. 504.

33. CRIMINAL LAW—Excusable Homicide.—On a murder trial it was not error to charge that the homicide was not excusable on the ground merely that deceased was passing over defendant's premises, or moving wood out of the passage-way for such purpose, contrary to defendant's order, at a time when defendant had no reasonable ground to believe he was in danger from deceased.—*Kendall v. Cone*, Ky., 19 S. W. Rep. 173.

34. CRIMINAL LAW — Homicide—Justification.—Under Mansf. Dig. § 1551, providing that an attempt to enter in a violent manner another's house for the purpose of offering personal violence to any one dwelling therein shall be a justification for homicide, it must reasonably appear to the person committing the homicide that the entrance of his assailant into the house will expose him to the danger of losing his life, or of receiving great bodily injury, and, if consistent with his own safety, he should prevent the entry by means not fatal.—*King v. State*, Ark., 19 S. W. Rep. 110.

35. CRIMINAL PRACTICE — Arson.—In an information for arson in setting fire to a building the ownership thereof may be alleged to be in the party in possession, because the offense is against the habitation. Where, however, the offense charged is the burning of certain "stacks of wheat of the value of $300.00," etc., the names of the owners thereof must be alleged and proved.—*Burger v. State*, Neb., 51 N. W. Rep. 1027.

36. CRIMINAL PRACTICE—Murder.—An information for murder, after striking out all surplusage, charged that defendant, "with a club, inflicted a mortal wound upon the body of deceased, with a premeditated design to effect the death of deceased, from which mortal wound he did die:" *Held*, that the information charged murder in the first degree, under Rev. St. § 4338.—*Bernhardt v. State*, Wis., 51 N. W. Rep. 1009.

37. CRIMINAL PRACTICE — Murder—Sentence.—Where the verdict was murder in the first degree, and no punishment was assessed by the jury, and the only error was in the excess of the punishment by the court, the supreme court may sentence defendant for murder in the second degree.—*Simpson v. State*, Ark., 19 S. W. Rep. 99.

38. CRIMINAL TRIAL—Competency of Jurors.—Where it is shown by the answers of jurors upon their *voir dire* that they belong to a society for the prevention of larceny, and to reclaim stolen property, and to bring offenders to justice, but there is nothing in the rules of the association or elsewhere that would require them to prosecute or convict an innocent person, or would authorize a conviction upon less or weaker evidence than is required in other cases, and nothing that would affect their duties as jurors, *held*, that the trial court did not err in overruling the defendant's challenges on the ground of membership.—*State v. Flack*, Kan., 29 Pac. Rep. 571.

39. DEATH BY WRONGFUL ACT—Parties.—Under Rev. St. art. 2903, giving damages for the death, by wrongful act, of a person, to the husband, wife, children, and parents of deceased, and article 2904, authorizing the action therefor to be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all, there is no misjoinder of plaintiffs in an action by the father and mother for the death of their child.—*Texas & P. Ry. Co. v. Hall*, Tex., 19 S. W. Rep. 121.

40. DECEIT—Sale.—If a member of a corporation, offering his stock for sale, falsely and fraudulently represents that the corporation is not in debt, and is making profits of a specified amount, and thereby induces one to purchase his stock, he is responsible for the fraud, even though the purchaser might have discovered it by

investigation into the affairs of the corporation. — *Redding v. Wright*, Minn., 51 N. W. Rep. 1056.

41. DEED — Description.—In a written obligation to convey certain real estate, it was described as the N. 1-2 of S. E. 1-4 of section 3, in a given township and range, "less 25 acres off the south side:" *Held*, that *prima facie* the description manifested the intention to lay off 25 acres in a parallelogram, with the whole of the south line of the N. 1-2 of the quarter section in question as its base.—*Watson v. Crutcher*, Ark., 19 S. W. Rep. 98.

42. DEED—Quitclaim—After-acquired Title.—A grantor in a quitclaim deed, who at the time of the execution thereof had simply filed his application to purchase the land from the State, had no interest subject to transfer and his after-acquired title did not vest in his grantee, even though the deed purported to convey to the grantee all the "estate, right, title, and interest which the grantor might thereafter acquire in and to" the premises.—*Anderson v. Yoakum*, Cal., 29 Pac. Rep. 500.

43. DEED—Recording.—Under Code Civil Proc. Dak. § 493, providing that every instrument acknowledged and "duly recorded" is admissible in evidence without further proof, the omission of the clerk, in recording a deed, to make on the record a similitude of the notarial seal, or a scroll or symbol to indicate it, does not make the original inadmissible without further proof.—*Smith v. Gale*, U. S. C. C., 12 S. C. Rep. 674.

44. DITCH ASSESSMENTS—Collateral Attack.—A ditch assessment on land owned by minors, though erroneous because there was no guardian *ad litem* appointed to answer for such minors in the proceedings for the construction of the ditch, is not void for that reason, and cannot be collaterally attacked.—*McBride v. State*, Ind., 30 N. E. Rep. 699.

45. ELECTIONS—Residence.—Where an unmarried man carries on his business in a town, claims that as his residence, and declares his intention of continuing his residence there, the fact that he and his father lease property in another town, to which his father moves, and that he goes there to sleep, and often to eat, is not sufficient to change his residence to the latter town.—*Carter v. Putnam*, Ill., 30 N. E. Rep. 681.

46. EQUITY—Fraud.—A defrauded party applying to a court of equity for relief must be compelled to exonerate himself from all imputation of ratifying, in any degree, the fraud of which he complains. He cannot be permitted to affirm as to a part of the transaction, and repudiate as to the residue, except in very special cases, where it is evident no injustice will be done.—*Carlton v. Hulett*, Minn., 51 N. W. Rep. 1053.

47. ESTOPPEL—Pleadings.—In an action on a note and mortgage by the assignee, it appeared that before the assignment was made, in answer to inquiries, defendant wrote one S that the note and mortgage are "all right, and will be paid when due;" that S gave defendant's letter to the payee, who used the same in selling the securities to plaintiff; that defendant did not know the purpose of the payee to sell the note to any one but S: *Held*, that defendant was not estopped, by his letter to S, to plead *non est factum*, as against plaintiff.—*Brickley v. Edwards*, Ind., 30 N. E. Rep. 708.

48. EXECUTION—Failure to Return.—Mansf. Dig. § 2971, provides that executions are returnable "in sixty days from their date:" *Held*, where the sixtieth day was Sunday, that it was the officer's duty to make return on the preceding Saturday, a return of the following Monday rendering him liable for the penalty imposed for a failure to make return "on or before the return day."—*Hawkins v. Taylor*, Ark., 19 S. W. Rep. 105.

49. EXECUTION— Restraining Sale.— The complaint in an action to enjoin an execution sale of land must contain a description of the land; and reference to an exhibit said to be attached to the complaint, and to contain a description of the land, is not sufficient.—*Armstrong v. Farmers' Bank of Frankfort*, Ind., 30 N. E. Rep. 695.

50. EXECUTION— Wrongful Levy — Damages.—Exemplary damages will not be allowed for levy of execution in ignorance of the filing of the *supersedeas* bond after the perfection of an appeal by the execution of a cost-bond only.—*Neese v. Radford*, Tex., 19 S. W. Rep. 141.

51. FALSE IMPRISONMENT — Defendants filed an affidavit and undertaking for the arrest of plaintiff as an absconding debtor. The bail given by plaintiff on his arrest being irregular and void, defendants' attorney ordered a second warrant and arrest. *Held*, that defendants were not liable to plaintiff as for false imprisonment, though the second arrest was illegal, if it was without defendants' knowledge or authority.—*Nemitz v. Conrad*, Oreg., 29 Pac. Rep. 548.

52. FRAUD—Evidence.—Where fraudulent representations are relied on as a defense to an action, the same must be proven by a clear preponderance of the evidence.—*Ish v. Finlay*, Neb., 51 N. W. Rep. 1031.

53. FRAUDULENT CONVEYANCES—Gift. — A father purchased land, and had the deed made without consideration to his minor son. At the time the father was insolvent, and was indebted to L N afterwards became a partner of L, and to pay L the father contracted an indebtedness to the firm. Subsequently A became associated with L and N, and a new debt was contracted with the new firm, in liquidation of the indebtedness to the old firm: *Held*, that the new firm became subrogated to the rights of L, and was entitled to treat the conveyance to the son as fraudulent, and to have it set aside.—*Rudy v. Austin*, Ark., 19 S. W. Rep. 111.

54. HOMESTEAD. — Where a debtor owns a house and three lots, containing less than one acre, within the limits of a city, upon which he resides with his family, and also had a carpenter shop which he afterwards converted into rooms, which he rented to a family, but did not lease any portion of the ground, but simply gave the tenant the right of ingress and egress to and from the premises, and reserved the basement to such building for his own use, as well as the lot upon which the building was situated, *held*, that the whole property is a homestead, and, as such, is exempt from forced sale upon execution.— *Layson v. Grange*, Kan., 29 Pac. Rep. 585.

55. HUSBAND AND WIFE — Antenuptial Agreement.— By an antenuptial agreement under seal a wife agreed to take 80 acres of land after her husband's death in lieu of dower. Afterwards the husband conveyed said land by deed in which his wife joined, and on the same day he conveyed another 80-acre tract to a trustee in trust to convey same to his wife if she survived him: *Held*, that parol evidence was admissible to show that this conveyance in trust was made as a substitute for the antenuptial agreement. — *Worrell v. Forsyth*, Ill., 30 N. E. Rep. 673.

56. INSURANCE—Homestead.—The execution of a deed of the homestead, which is signed by the husband alone, and therefore void, will not work a forfeiture of any rights under a fire insurance policy.—*German Ins. Co. of Freeport v. York*, Kan., 29 Pac. Rep. 586.

57. INSURANCE — Waiver. — A mutual fire insurance policy provided that, in case of certain acts on the part of the insured, "the company will not be liable for any loss," and the insured "shall forfeit all claim for such loss:" *Held*, in an action on the policy, that the fact that defendant recognized the policy as still in force was not inconsistent with its defense that plaintiff had forfeited all right to recover, the penalty in neither case being a forfeiture of the policy.— *Towle v. Ionia, Eaton & Barry Farmers' Mut. Fire Ins. Co.*, Mich., 51 N. W. Rep. 987.

58. INTOXICATING LIQUORS— License.— Where several persons join in a remonstrance and objection to the granting of license to an applicant to sell liquors, it is the duty of the board to which the application is addressed to set a time for the hearing thereof, allowing the objectors a reasonable opportunity to procure the evidence upon which they rely to defeat the application.—*State v. Coleman*, Neb., 51 N. W. Rep. 1025.

59. JUSTICE COURT — Bill of Particulars.— Technical

precision is not required in the statement of a cause of action in a bill of particulars in a justice's court. The liberal construction will be given to it, and a cause of action stated in the most general way will be sustained, in order to uphold a judgment inherently right.—*Missouri Pac. Ry. Co. v. Henning*, Kan., 29 Pac. Rep. 597.

60. LIBEL—Pleading.—A complaint for libel in writing, to an insurance company for which plaintiff was adjuster and otherwise publishing, a letter reciting, "The insulting remarks offered to our representative by your adjuster at his office, in the matter of * * * warrants us to withhold any new business from your local agent here," states no cause of action, though it alleged that defendant meant by the letter to impute to plaintiff a lack of business ability and skill, and a want of honesty and integrity in his business, etc.; as such meaning cannot be given, by innuendo, to the words used.—*Cole v. Neustadter*, Oreg., 29 Pac. Rep. 550.

61. LIMITATIONS — Homestead. — Where a lathe attached to and used in connection with plaintiffs' homestead was wrongfully levied on and sold to satisfy delinquent taxes on personal property, and was left in plaintiffs' possession until it should be called for by the purchasers, no right of action against which the statute of limitations would run accrued until its removal by the purchasers. — *House v. Phelan*, Tex., 19 S. W. Rep. 140.

62. LIMITATIONS — Pleading.— In an action on a note after the expiration of six years from maturity, the complaint alleged that a partial payment was made "April 17, 1882," which was within six years before bringing the action. The answer denied that the action accrued within six years and denied "any payment on April 17, 1882:" *Held*, that the answer, as a plea of the statute of limitation, was bad.— *Argard v. Parker*, Wis., 51 N. W. Rep. 1012.

63. LIMITATION OF ACTION—Conversion of Funds.—In an action against a township trustee to recover money received by him as such, and converted to his own use, after a demurrer was sustained to the original complaint, an amended complaint was filed, counting on defendant's official bond, which the original complaint did not do, but the amended complaint was based on the same defalcation and breaches of duty: *Held* that, the complaint having been filed before the statute of limitations had run against the action, an answer to the amended complaint, setting up the statute, was demurrable.—*Ross v. State*, Ind., 30 N. E. Rep. 702.

64. MALICIOUS PROSECUTION—Pleadings.—A complaint for malicious prosecution, which fails to show that the criminal action complained of had been determined, is bad on a general demurrer. — *Kiny v. Weed*, Wis., 51 N. W. Rep. 1011.

65. MASTER AND SERVANT—Negligence.—Where plaintiff, an employee of defendant, while at work threw a towel over a certain shaft, which was not a part of the machinery with which his service was connected, and was never intended for the use to which he put it, defendants are not liable for injuries sustained by plaintiff in attempting to draw the towel from the shaft while the machinery was in motion.—*Kaufman v. Maier*, Cal., 29 Pac. Rep. 481.

66. MECHANICS' LIENS.—A statement for a mechanic's lien, filed before the law of 1889, authorizing such statements to be amended, went into effect, cannot be amended after the statutory period for filing the same has elapsed, so as to change the description of the property sought to be charged to a distinct and separate lot from that described in the statement, as originally filed in the office of the clerk of the district court.—*Drake v. Green*, Kan., 29 Pac. Rep. 584.

67. MECHANICS' LIENS.— Where a person enters into a contract with the owner of a building to furnish material for the building, and there is no middle-man or other contractor intervening between them, he must be deemed an "original contractor," within Sayles, Civil St. art. 3165, allowing such a person four months within which to file a lien, and is not, therefore, confined to the thirty days allowed a "day laborer or other person" for that purpose.—*Matthews v. Waggenhaeuser Brewing Ass'n*, Tex., 19 S. W. Rep. 150.

68. MECHANICS' LIENS AS SET OFF.—The defendant set up a number of mechanics' liens upon the property, and claimed them as a set-off, without having paid the same. There was no claim that the contractor was insolvent, or that he would not satisfy such liens: *Held*, that the liens, to be available as a set-off, must be satisfied.—*Jones v. Sherman*, Neb., 51 N. W. Rep. 1036.

69. MORTGAGES — Failure of Consideration. — Where one of the considerations for a note and mortgage was certain land which the mortgagee agreed to convey, and the mortgagor was put in immediate possession thereof, there was no failure of consideration because the mortgagee did not execute a deed, the same not having been demanded, or because the land was subsequently forfeited for non-payment of taxes, since the forfeiture was in consequence of the mortgagor's default.—*Choate v. Kimball*, Ark., 19 S. W. Rep. 108.

70. MUNICIPAL CORPORATION — Cemeteries. — Under Rev. St. § 1454, requiring the "consent of the municipal authorities" to be obtained before laying out cemetery grounds within or near the limits of a city or village, the privilege may be "granted on motion," and it is not necessary that the "consent" be given by ordinance or formal resolution.—*Porch v. St Bridget's Congregation*, Wis., 51 N. W. Rep. 1007.

71. MUNICIPAL CORPORATIONS — Claims. — The words "claims or demands," in section 140, 141, of the Antigo city charter that no action in tort shall lie "against the city unless a statement of the wrong" shall be presented to the common council within 60 days; and that no action shall be maintained on any "claim or demand" unless the same has been presented to the common council and "disallowed in whole or in part refer to only such as arise *ex contractu;* and the words "disallowed in whole or in part" preclude an application of the sections to torts.—*Vogel v. City of Antigo*, Wis., 51 N. W. Rep. 1008.

72. MUNICIPAL CORPORATION — Contract for Public Works.—The Detroit city charter provides that no contract shall be let for the construction of any public works, nor shall any work be commenced, until the contract therefor has been duly approved and confirmed by the common council: *Held*, that where, after the board of public works, pursuant to instructions from the common council, made a contract for paving a street, the common council may reject the contract; and, in the absence of fraud or violation of law in respect to the lowest bidder, *mandamus* will not issue on relation of the contractor to enforce the contract.—*Grant v. Common Council, etc., of City of Detroit*, Mich., 51 N. W. Rep. 997.

73. MUNICIPAL CORPORATIONS — Franchise—Constitutional Law.—Where a city, in granting a right of way to a street railway company is not prohibited by the terms of such grant from extending similar privileges to other companies, the grant is not void on the ground that it confers an exclusive privilege.—*Mayor, etc., of City of Houston v. Houston City St. Ry. Co.*, Tex., 19 S. W. Rep. 127.

74. MUNICIPAL CORPORATION — Ordinance. — A complaint filed in the police court, charging the defendant with a violation of a city ordinance, for willfully refusing, as the agent of a water company, to supply the complainant with water, a tender being made in actual money for that purpose, that does not state that the water company was under a legal obligation by ordinance to supply such water, and does not in express words, or by fair implication, allege that the tender was sufficient, or was the amount of the legal or contract price of the water supply desired, is bad.—*Johnson v. City of Winfield*, Kan., 29 Pac. Rep. 559.

75. MUNICIPAL CORPORATION — Sewer — Damages. — Where a city, under legislative authority, constructs, in the bed of a stream, a covered sewer, which in ordinary storms is sufficient to carry off the water, it will

not be liable if, by reason of an extraordinary storm, the sewer becomes clogged, and causes the water to overflow, and injure adjoining property.—*Fairlawn Coal Co. v. City of Scranton*, Penn., 23 Atl. Rep. 1669.

76. MUNICIPAL CORPORATION—Telegraph Poles—Ordinance.—A municipal corporation may, by virtue of its police powers, control the erection and maintenance of telegraph poles and wires within its limits.—*City of Allentown v. Western Union Tel. Co.*, Penn., 23 Atl. Rep. 1070.

77. MUNICIPAL IMPROVEMENTS—Change of Grade.—If a city of the first class desires to confine a property owner, whose buildings have been damaged by a change of the established grade of a street, to the statutory remedy of an appeal from the award of the appraisers, the city authorities must proceed in substantial compliance of section 18 of the law governing cities of the first class and if they fail to do so, or so act as to induce the property owner to believe that he will not be damaged, and it transpires, after the expiration of the time within which he can take an appeal, that his property is damaged, he can maintain an action for damages, the statute making the city liable therefor in express terms.—*City of Topeka v. Sells*, Kan., 29 Pac. Rep. 605.

78. NEGLIGENCE—Dangerous Premises.—The defendant, a merchant, allowed customers to enter his store by passing through an adjoining wareroom used by him for receiving and storing goods. The plaintiff, while passing through the wareroom to enter the store, fell down a cellar stairway by reason of not looking where he went: *Held*, that the defendant was not responsible.—*Johnson v. Ramberg*, Minn., 51 N. W. Rep. 1043.

79. NEGLIGENT KILLING—Receivers.—A receiver is not a "proprietor, owner, charterer, or hirer," within Rev. St. art. 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railrord, etc., or by the negligence of their servants or agents.—*Yoakum v. Selph*, Tex., 19 S. W. Rep. 145.

80. NEGOTIABLE INSTRUMENT—Guaranty.—A stranger to a promissory note, who writes his name across the back thereof before it is delivered to the payee, incurs, *prima facie*, the liability of a guarantor.—*Fullerton v. Hill*, Kan., 29 Pac. Rep. 583.

81. NEGOTIABLE INSTRUMENT—Pleading and Proof.—Plaintiff, having offered the note, and proved that he received it before maturity, for value, with the indorsements thereon, and without notice of any defense, made a *prima facie* case, and cast the burden on defendant of disproving the genuineness of the indorsements. *Pendleton v. Smissaert*, Colo., 29 Pac. Rep. 520.

82. NEGOTIABLE INSTRUMENT—Recitals.—A recital in a note that the maker has deposited therewith bonds "as collateral security," and an authorization of the holder of the note to sell such bonds upon non-payment of the note, and apply the proceeds to its "payment and necessary charges," do not destroy its negotiability.—*Valley Nat. Bank of Chambersburg v. Crowell*, Penn., 23 Atl. Rep. 1068.

83. PARTNERSHIP.—The mere act of executing and filing articles of incorporation by three persons under the laws of Oregon, without doing anything further toward effecting an organization or carrying on the proposed business, does not create a partnership between the signers of such articles, so as to make the others liable for debts incurred by one of the signers, who assumed to do business under the proposed corporate name.—*Rutherford v. Hill*, Oreg., 29 Pac. Rep. 547.

84. PRESCRIPTION—Adverse Possession.—In the District of Columbia, an action for the recovery of land is barred in 20 years, and an open, visible, continuous, and exclusive possession for that period, with a claim of ownership adverse to all titles and claimants, gives title to the occupant.—*Sharon v. Tucker*, U. S. S. C., 12 S. C. Rep. 720.

85. PRESCRIPTION—User.—User, to create a title by prescription to a public street, must be under a claim of right by the public, adverse to the right of the owner, and continued without substantial interruption or change for a period equal to the statutory limitation in respect of actions for the recovery of real estate.—*City of Topeka v. Cowee*, Kan., 29 Pac. Rep. 560.

86. PROCESS—Residence of Defendant.—Under Rev. St. 1881, § 312, which provides that, where a defendant has no permanent residence in the State, process in commencement of an action may be served in any county in the State, where he may be found, a demurrer to a plea in abatement that defendant was a non-resident was properly sustained where it appears that defendant was personally served within the State.—*Reed v. Browning*, Ind., 30 N. E. Rep. 704.

87. PUBLIC LAND—Homestead Entries.—Under Rev. St. U. S. § 2290, which provides that a person applying for the benefit of the homestead law shall make affidavit before the register or receiver "that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person," an agreement by a partner to file on land under the United States homestead law, and take the title for the benefit of the partnership, is illegal and void.—*In re Groome's Estate*, Cal., 29 Pac. Rep. 487.

88. PUBLIC LANDS — Patents. — While a homestead claimant is in such privity with the title of the United States that he may attack a patent for the land, still his complaint must show that the land was unappropriated public land of the United States; that he was a qualified claimant within Rev. St. § 2289; and that he had complied with the provisions of section 2290; and a mere general statement that he had taken the proper and necessary steps toward obtaining and perfecting title thereto under the general homestead laws presents no material fact.—*Stewart v. Altstock*, Oreg., 29 Pac. Rep. 553.

89. RAILROAD COMPANIES—Abandonment of Lines.—Where the petition of a railroad company to abandon a portion of its line is granted, the title to the land which was taken for right of way and for other railroad purposes reverts to the original owners, without a reconveyance or order of the court.—*In re Flint's & P. M. R. Co.*, Mich., 51 N. W. Rep. 1001.

90. RAILROAD COMPANIES—Child Trespasser.—A railway company is not ordinarily obliged to keep a lookout for trespassers, whether adults or children, on its cars or track, nor to presume that they will expose themselves to danger thereon; but, having notice of their presence, and that they are in danger, its servants controlling the movements of its cars or machinery are bound to use reasonable care to avert it.—*Hepfel v. St Paul, M. & M. Ry. Co.*, Minn., 51 N. W. Rep. 1049.

91. RAILROAD COMPANIES— Contributory Negligence.—In an action against a railroad for injury to plaintiff at defendant's crossing, the evidence as to ringing of the bell, blowing the whistle, the speed of the train, and the existence of a head light was conflicting. It was dark and foggy at the time of the accident, and plaintiff testified that he was looking and listening, and was about 8 feet from the center of the track when he first saw and heard the engine, about 60 feet distant, and immediately tried to get away, but was struck before he could do so. *Held*, that the question of plaintiff's contributory negligence was for the jury.—*Thompson v. Toledo, A. A. & N. M. Ry. Co.*, Mich., 51 N. W. Rep. 995.

92. RAILROAD COMPANIES— Crossings.— It is the duty of every railroad company in this State to properly construct and maintain in good repair crossings over all public highways on the line of its road, so that the same shall be safe and convenient for travelers, so far as it can do so without interfering with the safe operation of the railroad. If it is negligence in that regard, and by reason thereof, a person without fault is injured in his property while traveling over a defective

crossing, the corporation owning or operating such railroad is liable for the damages sustained.—*Burlington & M. R. R. Co. v. Koonce*, Neb., 51 N. W. Rep. 1033.

93. RAILROAD COMPANIES — Crossing—Negligence.—A railroad company must use reasonable care in regard to stationing flagmen or erecting gates at crossings, and the fact that the statute of Michigan (3 How. St. § 3301) charges the railroad commissioner with the duty of determining the necessity of a flagman at any and all crossings in the State does not relieve the company from taking such other precautions as public safety and common prudence dictate.— *Grand Trunk Ry. Co. Canada v. Ives*, U. S. S. C., 12 S. C. Rep. 679.

94. RAILROAD COMPANIES—Incorporation.—*Held*, upon the facts that B was the company; that he really made said contract with himself; and that the whole scheme was a fraud on the statute authorizing the organization of railroad companies. — *Chicago & G. T. Ry. Co. v. Miller*, Mich., 51 N. W. Rep. 981.

95. RAILROAD COMPANIES — Negligence.— *Held*, in an action against a railway company for the death of plaintiff's intestate, who was killed at a crossing in a town by a train on defendant's road, where the whistle was blown one mile from the corporate limits, but there was no proof that afterwards it had been blown or the bell rung until the train reached the whistling-post at the corporation line, that the company was guilty of statutory negligence, and that it was no defense to show that deceased had been guilty of gross negligence in getting on the track, and that, when the engineer saw him, every precaution was taken to stop the train.—*Louisville & N. R. Co. v. Howard*, Tenn., 19 S. W. Rep. 116.

96. RAILROAD COMPANIES — Negligence — Crossing.—When, by reason of an omission or a neglect to sound the whistle or ring the bell of a locomotive as it is approaching a dangerous crossing, the vigilance of a traveler upon the wagon road is allayed, and he is led nto a position or situation in which his life is jeopardized and finally lost, his lack of vigilance cannot be held to amount to culpable or concurring negligence, as a matter of law. — *Hendrickson v. Great Northern Ry. Co.*, Minn., 51 N. W. Rep. 1044.

97. RAILROAD COMPANIES— Traffic Agreements.—Two or more railway companies, whose roads form a continuous line, may enter into a joint arrangement for operating their roads as one line, and become jointly liable for money borrowed to be used in furtherance of the business of such line.— *Chicago P. & St. L. Ry. Co. v. Ayers*, Ill., 30 N. E. Rep. 687.

98. RAILROAD RIGHT OF WAY—Abandonment.—Where a railroad company, after condemning land for a right of way, and constructing its road thereon, leases a parallel line for 10 years and ceases to use its own line, though with the intention of resuming such use at the expiration of said time, its taking up its track, and allowing its right of way to be fenced in by the owner of the adjoining land, and held by him during said 10 years, do not constitute an abandonment of its right of way.—*Durfee v. Peoria, D. & E. Ry. Co.*, Ill., 30 N. E. Rep. 686.

99. REMOVAL OF CAUSES—Separable Controversy.—In order to justify a removal, under the act of March 3, 1875, § 2, of the whole case, because of a separable controversy between citizens of different States, "which can be fully determined as between them," it was necessary that the whole subject-matter of the suit should be capable of being finally determined as between them, and complete relief afforded as to the separable cause of action, without the presence of others originally made parties to the suit.—*Torrence v. Shedd*, U. S. S. C., 12 S. C. Rep. 726.

100. REPLEVIN OF ATTACHED PROPERTY.—In replevin for property seized by defendant as sheriff on attachment against one from whom plaintiff had purchased the property, it being claimed that the sale was fraudulent, defendant may, to show the indebtedness of the seller to the attaching creditor, introduce the judgment in the action by such creditor against the seller, though the service on the seller therein was by publication, since the judgment is used to effect the attached property only. — *Mosgrove v. Harris*, Cal., 29 Pac. Rep. 490.

101. SALE—Evidence — Memory.— In an action to recover a balance due upon a contract to supply an ore crusher, payments made after the crusher begins work, while not conclusive, indicate that for a while, at least, it satisfied the conditions of the contract, and are properly to be considered in determining the merits of the action.— *Chateaugay Ore & Iron Co. v. Blake*, U. S. S. C., 12 S. C. Rep. 712.

102. SALE—Recission.—A written warranty of a reaper contained these provisions: "If, on starting the machine, it should in any way prove defective, or fail to work, the purchaser shall give prompt written notice to the agent from whom he purchased it, and allow sufficient time for a person to be sent to put it in order, and the defective part, if any, replaced; the purchaser rendering necessary and friendly assistance:" *Held*, that a substantial compliance with these provisions was necessary to entitle the purchaser to rescind the contract and return the machine.— *Sandwich Manuf'g Co. v. Feary*, Neb., 51 N. W. Rep 1026.

103. SALE—Warranty. — Where plaintiff sold wine to defendant, "to be delivered in merchantable order," and to be approved by defendant "within three days after the delivery," there was no warranty of the quality of the wine, further than to allow defendant three days within which to satisfy himself that the wine was merchantable. —*Gentilli v. Starace*, N. Y., 30 N. E. Rep. 660.

104. SCHOOL-WARRANTS—School-districts.—Where the county treasurer, on presentment to him of school-warrants, refused to pay the same, the holder thereof may maintain an action thereon against the school-district that issued them, the statute providing that school-districts are corporations, and may make contracts and sue and be sued.— *School-Dist. No. 7 v. Reeve*, Ark., 19 S. W. Rep. 106.

105. SLANDER—Evidence. — In an action for slander, proof that the defendant repeated the words alleged to be slanderous at other times before the bringing of the action than those set forth in the petition may be introduced for the purpose of showing malice.—*McClenehan v. Reid*, Neb., 51 N. W. Rep. 1037.

106. SPECIFIC PERFORMANCE — Gift. — The specific execution of an alleged parol gift of land, of which the complainant is in possession, will not be decreed when the evidence as to the gift is conflicting, and the preponderance of the evidence tends to show that complainant's possession of the land is merely as tenant at will of the defendant. — *Wolfe v. Bradberry*, Ill., 30 N. E. Rep. 665.

107. STATUTES — Legislative Journals. — A bill which, after its passage, is signed by the presiding officers of each house, in the presence of the house, as provided by the constitution, and which is approved by the governor, affords conclusive evidence that it was passed according to the constitution, and the journals of the houses cannot be looked to in determining the question, in the absence of express constitutional provision to that effect. — *Williams v. Taylor*, Tex., 19 S. W. Rep. 156.

108. TAXATION — Mortgage.— Under Pol. Code, §§ 3627, 3628, which required the mortgage to be assessed to the person who owned it on the first Monday of March, where defendant owned the mortgage on that day, the subsequent assignment thereof did not relieve defendant of its liability for the payment of the taxes.—*San Gabriel Valley Land & Water Co. v. Witmer Bros. Co.*, Cal., 29 Pac. Rep. 500.

109. TAXATION — University Lands —Exemption. —No part of the section of Indian lands granted by congress to the Ottawa University, and upon which the university is located, is exempt from taxation, except that which remains and is used as a site for the university.

—*Ottawa University v. Board of County Com'rs of Franklin County*, Kan., 29 Pac. Rep. 599.

110. TAXATION—Water-mains.— The water-mains and electric wires of a water and light company are personal property for purposes of taxation.— *Shelbyville Water Co. v. People*, Ill., 30 N. E. Rep. 678.

111. TELEGRAPH COMPANIES— Delay.— The defendant telegraph company accepted a telegram, and undertook to deliver it about 9 o'clock at night, it cannot be excused for failure to perform the contract because its office to which the telegram was directed was practically closed against the office from which it was sent, no effort having been made to send the message until next morning, after it was too late for the purpose for which it was intended.—*Western Union Tel. Co. v. Bruner*, Tex., 19 S. W. Rep. 149.

112. TENANTS IN COMMON— Adverse Possession.—The mere fact that one of decedent's heirs take possession of his land, receives the rents, and pays the taxes, about equal to the rents, and makes a few repairs, is not enough to give title by adverse possession against the other heirs, who lived at a distance, and are not shown to have known of these facts. — *Phillipson v. Flynn*, Tex., 19 S. W. Rep. 136.

113. TORT-FEASORS— Joint and Several Liability.—In an action for malicious prosecution against several defendants, a recovery may be had against one or more or all, as their liability is joint and several, and plaintiff might have brought separate actions, though he could have but a single satisfaction, except as to costs.—*Albright v. McTighe*, U S. C. C. (Tenn.), 49 Fed. Rep. 817.

114. TRESPASS TO TRY TITLE—Pre-emption.—In trespass to try title plaintiff cannot recover where he relies upon an application for pre-emption, and fails to show compliance with the law with respect to occupation of the land, or payment of the purchase money.—*Conn v. Franklin*, Tex., 19 S. W. Rep. 126.

115. TRIAL—Reception of Evidence.—In an action for personal injuries, where the case has been closed and argued, and the judge is about to charge the jury, it is not an abuse of discretion for the court to refuse to open the case on the statement of the attorney for defendant that he has just heard of a witness who would corrobate the principal witness for the defense.—*Everman v. City of Menomonie*, Wis., 51 N. W. Rep. 1013.

116. TRUST — Estoppel of Heir.—One of three sons claimed a resulting trust in certain land of which his father held the legal title. One of his brothers bought the land from him for full value, under the advice of their father, who recognized the trust. Afterwards the father died intestate, leaving his three sons his only heirs: *Held*, that the third son was estopped from claiming any interest in said land, being bound by his father's recognition of the trust.—*Ellsworth v. Ellsworth*, Ill., 30 N. E. Rep. 672.

117. USURY AS DEFENSE.—Plaintiff loaned money to defendant at usurious rates, taking his note, with sureties therefor, at the maturity of which the defendant paid all the usury and part of the principal, and gave a new note, with other sureties, for the balance of the principal: *Held*, notwithstanding the statute requiring suits to recover usury to be brought within a year from the time it was paid, that, in a suit on the renewal note more than a year after its execution, defendant could plead usury, such renewal not removing the taint of usury; the prior payment being, at the option of the debtor, treated as a payment on the principal, and legal interest thereon.—*Neale v. Rouse*, Ky., 19 S. W. Rep. 171.

118. VENDOR AND VENDEE—Assumption of Mortgage. —Where a person assumes a mortgage upon real estate as a part of the consideration, and conveys the same to another, who assumes such mortgage as a part of the consideration, the first grantee stands as surety for the second grantee, and, if compelled to pay the debt, may recover from the latter.—*Stover v. Tompkins*, Neb., 51 N. W. Rep. 1040.

119. VENDOR AND VENDEE—Rescission of Contract.— Where plaintiff contracts to sell land, and the intending vendee executes an installment note for the price, but fails to perform his part of the contract, whereupon plaintiff notifies him that he (plaintiff) has elected to rescind the contract, plaintiff has no longer a right of action on the contract or on such installment note, but only a right of action for the breach of the contract.— *Glassell v. Coleman*, Cal., 29 Pac. Rep. 508.

120. VENDOR AND VENDEE—Statute of Frauds.—Where a contract for the purchase and sale of real estate is made, and the vendor executes a title-bond for the conveyance of the property to the vendee, and the vendee, with the consent of the vendor, accepts the title-bond, takes possession of the real estate, exercises acts of ownership over it, and pays a portion of the purchase money, the vendor may afterwards, when the remainder of the purchase money becomes due, maintain an action therefor against the vendee, notwithstanding the statute of frauds.—*Greenlees v. Roche* Kan., 29 Pac. Rep. 590.

121. VILLAGE—Validity of Incorporation.—In a proceeding in the nature of a *quo warranto* to determine the validity of the incorporation of a village under Rev. St. 1891, ch. 24, art. 11, §§ 182-184, parol testimony is admissible to show that the teritory sought to be incorporated had not at the time the petition for incorporation was filed the population required by said act.—*Kamp v. People*, Ill., 30 N. E. Rep. 680.

122. WILLS.—S died testate, leaving the residue of his estate to his son T, "who is now absent. If my son will not be heard from within ten years," he devised his property to his nephews and neices, naming them. Testator left no wife or daughters. Defendant, the wife of T, a short time after testator's death, obtained a divorce *a mensa et thoro*, by the terms of which the title to the real estate in controversy was vested in her absolutely: *Held*, that the will vested a present estate in fee in testator's son, which passed to his wife under the decree in divorce.—*McManany v. Sheridan*, Wis., 51 N. W. Rep. 1011.

123. WILLS—Execution.—A man signed, in the presence of two attesting witnesses, an instrument in the following form: "Know all men by these presents, that I, Joseph Robinson, for the consideration of one dollar, to me in hand paid, as well as my affection, do hereby assign and set over to my daughter Eliza Jane Brewster all of my property, both personal and real, to have the same after my death. Witness my hand and seal this 7th day of May 1877." He stated just before he signed the instrument that he was making his will: *Held*, that the instrument was a valid will.—*Robinson v. Brewster*, Ill., 30 N. E. Rep. 683.

124. WILL—Testamentary Powers.—Testator, by her will, after making sundry bequests, left "all the balance of my personal estate after the payment of my debts and aforesaid legacies" to her two sisters, and provided that "in order to pay any of my debts or any of the aforesaid legacies" her executors should sell "my house and lot on L street." The will specifically disposed of all her property except such house and lot, of which no other mention was made in the will: *Held*, that the clause, "in order to pay any of my debts, or any of the aforsesaid legacies," was not a limitation of the executor's power to sell the house and lot.—*In re Adams' Estate*, Penn., 23 Atl. Rep. 1072.

125. WITNESS—Transactions with Decedents.—Rev. St. § 2248, which provides that in all actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with such decedent, neither party shall be allowed to testify as to such transaction, unless called by the opposite party, does not prevent a son, defending in ejectment against one claiming under a deed from his deceased father, from testifying to a prior parol gift of the land to him by his father since he does not claim as heir.—*Wootters v. Hale*, Tex., 19 S. W. Rep. 134.

ABSTRACTS OF DECISIONS OF THE MISSOURI COURTS OF APPEAL.

KANSAS CITY COURT OF APPEALS.

CONTRIBUTORY NEGLIGENCE—Evidence.—An objection to introduction of evidence that, it is, "incompetent, irrelevant and immaterial, "does not specify the ground on which the objection is made. It is not incumbent on plaintiff to show in the first instance, that he was free from negligence. Contributory negligence is a defense that must be pleaded and proved, and the burden of showing it is on the defendant. — *Churchman v. The City of Kansas.*

COSTS—Appeal from Probate Court.—If the administrator does not appeal from judgment of the probate court, then, any of the persons named in Sec. 285, R. S. may do so for him and in his name. The bond required by Sec. 288 is intended as an indemnity to the estate against any injury resulting from the appeal; and if on trial anew in the circuit court judgment is rendered against the estate, the judgment for costs must also be against the estate. The statute does not authorize judgment for costs to be rendered against the appellants in the circuit court.—*Harrington v. Evans.*

ELECTIONS—Validity.—The provision as to the time for holding the election provided for in Sec. 4598, R. S. is mandatory; such an election will be void if appointed and held on a day more than 40 days after the receipt by the county court of the petition for such election, and if the order for an election, and the election as held, leaves out any precinct in the county which is entitled to vote on the proposition involved, the entire election is void.—*State of Missouri v. Webb.*

FOREIGN CORPORATIONS—Franchise — Partnership.—Citizens of this State who apply for and procure a corporate franchise from another State, for the purpose of doing business in this State, alone practice a fraud upon such other State; their franchise is void, and they are liable as partners. In this State a party who makes a contract with a body, believing it to be a corporation, when in fact it is not, may deny its legal existence when he seeks, not to repudiate his contract, but to enforce it.—*Cleaton v. Emery.*

FOREIGN CORPORATIONS — Franchise—Partnership.—Citizens of this State who apply for and procure a corporate franchise from another State, for the purpose of doing business in this State, alone, practice a fraud upon such other State; their franchise is void, and they are liable as partners. In this State a party who makes a contract with a body, believing it to be a corporation, when in fact it is not, may deny its legal existence when he seeks, not to repudiate his contract, but to enforce it.—*Cleaton v. Emory.*

GARNISHMENT—Rights of Creditors.—The garnishee made an unwritten agreement with defendant to advance to it certain money for payment of debts. At the time of making this agreement, garnishees were the owners and holders, by assignment, of a chattel mortgage and notes thereby secured, executed by defendants, and were to repay themselves for moneys so advanced, out of proceeds of sale under the mortgage if proceeds were sufficient. The garnishee sold under the mortgage and proceeds exceeded the mortgage debt. The surplus was applied by them before garnishment to repayment of money advanced under the unrecorded and unwritten agreement: *Held*, the unwritten agreement was in the nature of a pledge which became consummate by possession before garnishment, and a written instrument was unnecessary, and neither the mortgagor nor their attaching creditor can maintain an action for this surplus against the garnishee.—*Jewell Pure Water Co. v. K. C. Towel & Laundry Co. Defts., Harkness et al Garnishees.*

INDICTMENT.—The information contained two counts, both for the same offense. Defendant's conviction in the justice's court was general, without mentioning either count. In the circuit court he was tried on the first count: *Held*, where one offense is charged in separate counts a general verdict is sufficient. Defendant was tried and convicted before the justice and in the circuit court for one and the same offense.—*State of Missouri v. Haycraft.*

INSURANCE POLICY — Conditions in.— In a suit on an insurance policy which provided "that the policy should be void, if, without permission therefor in writing, the building, or any part thereof, be or become vacant, or cease to be used daily for the purpose stated in the policy," which purpose was as a livery stable, and at the time the building was destroyed, and for some months before, it had ceased to be used for that purpose: *Held*, that when plaintiff ceased to use the building as it was used when the policy was issued, his right to indemnity ceased, and no act of the local agent can modify or change the plain terms of the policy.—*Sprague v. The Western Home Insurance Co.*

LEASE—Assignment of— Rent. — In an action for rent under a written lease containing a covenant by defendant to pay plaintiff the rent for the whole term, the premises having afterwards been turned over by defendant to another, from whom the landlord accepted several monthly payments of rent: *Held*, a lessor's knowledge of the assignment of a lease and acceptance of rent from the subleasee, notbeing at all inconsistent with holding the original lessee to his express covenant for the remaining unpaid rent, cannot, alone, have the effect of discharging the original lessee.—*Ward v. Krull.*

MECHANIC'S LIENS.—In an action to enforce a mechanic's lien for aihot air furnace, pipes, etc., placed on brick foundation built for that purpose, and to which furnace was not attached otherwise than by its own weight, in the cellar of defendant's residence: *Held*, that under Sec. 6705 R. S. 1888, plaintiff was entitled to his lien.—*Cook v. McNeal.*

MINOR — Selling Liquor to.— In a prosecution under section 4588 R. S. for selling liquor to a minor: *Held*, that a sale made to a minor under an order disclosing his principal, was a sale to the principal; but, when the minor purchased liquor without disclosing his principal, the law presumes that the purchase was made for his own use. The mere fact that he was making the purchase for the use of another, nor his statement to that effect, if he has made such statement, would destroy this presumption. — *State of Missouri v. McLane.*

PERSONAL PROPERTY—Placed by License on Land of Another—Right of Removal.—In an action by a judgment creditor of a railway company, who had in a suit against the railway company, established a vendor's lien upon the rails used in constructing a street railway, against the owner of the land on which the road was constructed, to replevy the rails: *Held*, that where a railway company, by permission of the owner of land, locates its roadway, places its ties and rails thereon and fastens them so that cars can run over them, they become annexed to realty, and in the absence of an agreement with the land owner, that the ties and rails were to be held by the company as personal property, cannot be removed.—*Tudor Iron Works v. Hitt.*

SPECIAL TAX BILL.—Under Sec. 1524, R. S. 1889, an assessment made by a city of third class against defendant's lots should have been made, not against the lots themselves, but against him as owner, and a failure to do this invalidates the assessments in so far as his lots are concerned. The tax bills are invalid, also because benefits were assessed against four lots in a gross sum, when the lots should have been separately assessed with the benefits chargeable to each.—*City of Sedalia v. Gallic.*